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ABSTRACT

The monograph addresses legal issues involving discrimination against handicapped persons and the key legal requirement of reasonable accommodation. Four chapters in Part I examine background issues, including definitions and statistical overviews of handicaps; historical attitudes toward handicapped persons and an analysis of the extent of discrimination in education, employment, institutionalization, medical treatment, sterilization, architectural barriers, and transportation; a review of Federal Civil Rights legislation regarding the handicapped (Rehabilitation Act of 1973, Education for All Handicapped Children Act, Developmental Disabilities Assistance and Bill of Rights Act, Architectural Barriers Act, and Constitutional provisions); and a discussion of the goal of full participation and its impact on rehabilitation, employment, education, institutionalization, transportation, and architectural barriers. Part II examines the legal principles and standards involved in handicap discrimination law. The practice of reasonable accommodation is explored in terms of requirements for individualizing opportunities and providing equivalent opportunities; limitations on the obligation to accommodate; and removal of architectural, transportation, and communication barriers. A further chapter focuses on applying civil rights law to handicap discrimination. A final section presents conclusions on the general topic of discrimination as well as on subtopics of reasonable accommodation and the application of civil rights laws to handicap discrimination. (CL)

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Accommodating the Spectrum of Individual Abilities

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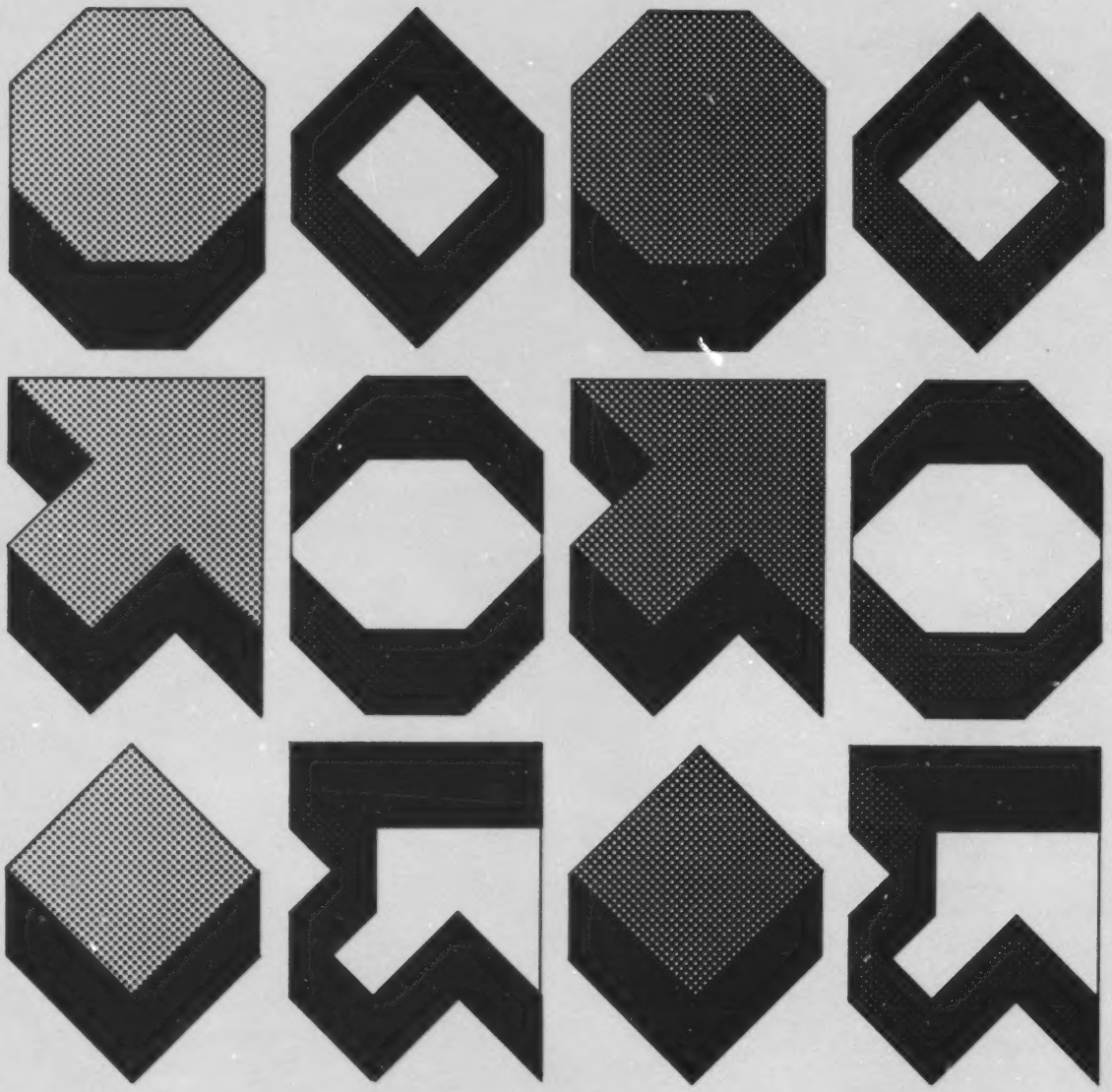

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U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
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Preface

In 1978 the United States Congress added "discrimination on the basis of handicap" to the jurisdiction of the U.S. Commission on Civil Rights. *Accommodating the Spectrum of Individual Abilities* builds upon a 2-day consultation the Commission held in May 1980 on "Civil Rights Issues of Handicapped Americans," at which the Commission heard from nationally recognized experts.

This monograph focuses on the issue of reasonable accommodation because of its central importance to handicap discrimination law. Part I of the monograph provides basic information about handicapped people, the barriers they face, and their legal rights. Part II suggests ways to resolve legal issues concerning handicap antidiscrimination requirements.

Acknowledgments

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Overall supervisory responsibility rested with Paul Alexander,* Acting General Counsel, for the initial phases of this project, and with Caroline Davis Gleiter, Acting General Counsel, for its final phases.

The Commission expresses its gratitude to the Department of Labor for allowing Thomas Hodges, a labor economist and quadriplegic, to work on this project. Mr. Hodges died shortly before final Commission approval of the monograph. He contributed in many ways beyond shaping and drafting parts of this document. Commission staff regarded highly his many personal qualities and profound commitment to the highest standards of scholarship and the full participation of handicapped people.

*No longer a member of Commission staff.

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Introduction

Almost 30 Federal laws and numerous State and local laws prohibit discrimination against handicapped persons. The principle underlying such laws—that handicapped people are entitled, as a matter of social justice, to a fair and equal chance to participate in American society—is seldom disputed. Statutes prohibiting discrimination against handicapped individuals have had broad bipartisan support, as have government benefit and service programs for handicapped citizens. Attempts to pare down or eliminate services, benefits, and safeguards for handicapped people have repeatedly been defeated as a result of efforts by strong coalitions of diverse public interest groups.[1]

The effects and application of handicap civil rights laws, however, are not well understood, despite nearly unanimous support of their overall purpose. Legal analysis and interpretation are not fully developed, and there are popular misconceptions about their requirements. As a result, many people harbor reservations, concerns, and unanswered questions about civil rights provisions that protect handicapped people: Do handicap antidiscrimination statutes only prohibit discrimination against handicapped people, or have they been interpreted and applied to provide extraordinary privileges to handicapped individuals not available to other citizens?[2] Are handicapped people making unlimited claims on public funds to remove anything that inconveniences them?[3] Is discrimination really a serious disadvantage to handicapped people, or do most of their problems result from their own innate limitations? Can society afford to accommodate the needs of handicapped people? Are we "overdoing help for the handicapped"?[4] What is the

[1] *See, e.g.,* Felicity Barringer, "How Handicapped Won Access Rule Fight," *The Washington Post,* Apr. 12, 1983, p. A–15; Joanne Omang, "Bell Withdraws 6 Proposals for Educating Handicapped," *The Washington Post,* Sept. 30, 1982, p. A–1.

[2] *See, e.g.,* Henry Fairlie, "We're Overdoing Help For the Handicapped," *The Washington Post,* June 1, 1980, p. D–1 (hereafter cited as Fairlie).

[3] *See, e.g.,* "Must Every Bus Kneel to the Disabled?" (editorial), *New York Times,* Nov. 18, 1979, p. 18–E; Fairlie, p. D–1.

[4] Fairlie, p. D–1.

concept of "reasonable accommodation," how is it applied, and what are its limits?

The aim of this monograph is to examine such questions, the purpose and content of handicap civil rights laws, the problem of discrimination they seek to remedy, and the emerging legal principles concerning the rights and obligations arising under such laws. In particular, the monograph focuses on "reasonable accommodation," a requirement that has become a pivotal concept in handicap antidiscrimination law because it serves as a realistic middle ground between doing nothing and doing everything to assist handicapped people.

One major misconception the monograph seeks to dispel is that accommodating handicapped persons to allow their participation is necessarily a difficult and expensive proposition. Overemphasis of "worst case" illustrations has engendered some confusion and apprehension. One widely publicized example involved a Federal regulation that purportedly required a substantial expenditure to build ramps to a library in a small Iowa town, although none of the residents used wheelchairs.[5] In another example, *Time* magazine reported that a California firm spent $40,000 to lower all of its drinking fountains.[6]

Less publicity has highlighted accommodations provided at little or no cost with significant benefits to handicapped people:

- Installing paper cup dispensers to allow people in wheelchairs to use water fountains;
- Adding inexpensive braille or raised letter and number tabs to doors and elevator control panels;
- Changing desktops and tables to appropriate heights for persons who are very short or who use wheelchairs;
- Providing concrete, step-by-step instructions for mentally retarded people;
- Providing a wooden pointer for reaching the upper buttons on an elevator control panel;
- Moving a program or service to an accessible part of a building so that a handicapped person can participate;
- Using alternative testing procedures for students with visual impairments, learning disabilities, or orthopedic impairments that interfere with reading or writing ability;
- Providing seating priority for mobility impaired persons for whom standing would be difficult.

Studies have found that workplace accommodations to handicapped individuals frequently cost little or nothing.[7] A U.S. Department of Labor study concluded that accommodation is "no big deal."[8] In other contexts, including, particular-

[5] Steven Roberts, "Harder Times Make Social Spenders Hard Minded," *New York Times*, Aug. 3, 1980, p. E–3.

[6] "Helping the Handicapped: Without Crippling Institutions," *Time*, Dec. 5, 1977, p. 34.

[7] E.I. du Pont de Nemours and Company, *Equal to the Task: 1981 du Pont Survey of Employment of the Handicapped* (1982), p. 17; U.S., Department of Labor, *A Study of Accommodations Provided to Handicapped Employees by Federal Contractors*, (1982), vol. 1, pp. ii, 28–35 (hereafter cited as DOL *Accommodation Study*). The Commission is unaware of any studies contesting these findings. According to published reports, leaders in the business community have generally endorsed and cooperated with efforts to increase participation of handicapped people in private employment. See, Bob Gatty, "Business Finds Profit In Hiring the Disabled," *Nation's Business*, August 1981, p. 30.

[8] DOL *Accommodation Study*, p. ii. DOL and du Pont studies only examine accommodations for

ly, mass transit, modifications to permit participation by handicapped persons may be more massive and costly.[9]

To provide both concrete descriptive information and an analytic framework for understanding and applying handicap nondiscrimination requirements, such as the concept of reasonable accommodation, this monograph has two parts. The first part provides basic information intended for a general audience; the second part presents conceptual and legal material geared primarily toward the needs of regulators, judges, lawyers, and practitioners who set and implement policy.

Part I consists of four chapters. Chapter 1 discusses the diversity of handicapped individuals, examines definitions of the term "handicapped," adopts a definition for purposes of this report, and provides a statistical overview of handicapped people as a class. Chapter 2 describes ongoing and historical handicap discrimination and examines the prejudices and stereotypes that may prompt discriminatory actions and practices. Chapter 3 summarizes the basic legal framework governing handicap discrimination, explaining the major applicable Federal laws and constitutional guarantees. Chapter 4 discusses the concept of full participation, reviews Congress' declared overall objective for handicapped people, examines the costs and benefits of full participation, and explores the goal's essential components.

Part II, which consists of three chapters, suggests an analytic framework for answering difficult legal questions about handicap nondiscrimination requirements, particularly the concept of reasonable accommodation. Chapter 5 provides a conceptual basis for understanding the causes of handicap discrimination and the legal principles that redress it. Chapter 6 explains legal standards that define reasonable accommodation and the scope and limits of its application. Chapter 7 considers how established civil rights principles and analyses apply to discrimination on the basis of handicap, concluding that any concepts not clearly transferrable should not be mechanically forced into this new area of law.

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workers who are employed. They do not review the potential substantiality of expenses required for accommodating the presumably more severely handicapped persons not currently employed. *See* DOL *Accommodation Study,* p. vii.

[9] Issues of the costs and benefits of participation by handicapped people are discussed in chap. 4 under the section entitled "The Costs and Benefits of Full Participation."

Chapter 1

Who Are Handicapped Persons?

Almost everyone knows someone who is handicapped. The term handicap is commonplace in both ordinary usage and legal parlance. But we seldom think about the meaning of the word handicapped, consider the range of people to whom it applies, or realize the implications of imposing this label on individuals.

The people commonly described as handicapped are an extremely diverse group. They are termed handicapped for a number of very different reasons: some are unable to get around without wheelchairs; others learn at a slower rate than most people; some experience abnormal electrical discharges in their brains called seizures; and still others have malformed or disfigured facial features. People are termed handicapped because they "talk funny" or "walk funny"; because they cannot hear or cannot see; because their reasoning and thought processes do not work in conventional ways; because their limbs are missing or malformed; because they have learning disabilities, such as dyslexia or hyperactivity; because they have disorders like kidney disease, arthritis, heart disease, diabetes, or cancer; or even because they once had certain conditions, such as mental illness, cancer, or seizures, from which they have since recovered.

It is difficult to identify any distinguishing characteristic or unifying trait in this remarkably heterogeneous group of people denominated handicapped. Yet, handicapped people[1] are commonly perceived as a distinct class of people, different from the rest of society. Mental and physical impairments are generally assumed to make the individuals who have them substantially different from others and to limit performance or achievement to such an extent that the individuals cannot participate successfully in society without elaborate and costly assistance. Later sections of this monograph examine such assumptions of differentness, inability to achieve, and need for ex-

[1] In accordance with the preference of many handicapped persons, the monograph seeks to avoid using handicapping conditions as nouns (the handicapped, the deaf, an epileptic, for example) to describe individuals or groups. Where appropriate, adjectival or prepositional phraseology, such as handicapped persons, mentally retarded citizens, and persons with epilepsy, is used. In quotations, however, original usages have been retained.

traordinary help, and suggest that they are both oversimplified and distortive.[2] In particular, the focus upon perceived individual limitations will be reevaluated in the context of alternative ways of performing tasks and activities that may prevent a physical or mental limitation from being an impediment to participation. First, however, it is important to understand who has been included in the classification (covered in this chapter), how they have been treated (chapter 2), and what laws and governmental programs have been established to assist and protect them (chapter 3).

Defining "Handicaps"

There has been some controversy regarding the usages of the words "disability" and "handicap."[3] Some commentators assert that disability refers to a medical condition and that handicap refers to one's status as a result of a disability.[4] Under this definitional system, the applicability of the handicap label depends on how the disabled person interacts with his or her environment; a disabled person who is successful in the eyes of society would not be considered handicapped, while an unsuccessful disabled person would be.

Other authorities have taken precisely the opposite view. They argue that the word "disabled" means not able to do things and affects the entire person, in contrast to "handicap," which refers to a specific, well-bounded limitation.[5] Thus, a person might accept that he or she has a handicap, but strive not to be disabled.

Whatever validity each of these differing semantic approaches may have,[6] the terms disabled and handicapped are both used in laws, professional practice, social service programs, and general parlance as equivalent terms for describing a class of persons with physical and mental impairments.[7] This monograph, therefore, uses the words handicap and disability interchangeably.

Webster's dictionary defines handicap as "a disadvantage that makes achievement unusually difficult."[8] Although

[2] See chap. 5.

[3] This section relies extensively on "Who Are 'Handicapped' Persons?" in *The Legal Rights of Handicapped Persons*, ed. Robert L. Burgdorf, Jr. (Baltimore: Brookes, 1980), pp. 1–52 (hereafter referred to as *The Legal Rights of Handicapped Persons).*

[4] *E.g.*, Steven S. Weiss, "Equal Employment and the Disabled: A Proposal," *Colum. J. L. & Soc. Probs.*, vol. 10 (1974), pp. 457, 461, n. 23 ; Bruce E. Vodicka, "The Forgotten Minority: The Physically Disabled and Improving Their Physical Environment," *Chi.-Kent L. Rev.*, vol. 48 (1971), pp. 215, 220; Buscaglia, *The Disabled and Their Parents: A Counseling Challenge* (1975), p. 18, cited in *The Legal Rights of Handicapped Persons*, p. 4; Frank Bowe, *Handicapping America, Barriers to Disabled People* (New York: Harper & Row, 1978), pp. 16–17.

[5] Saad Nagi, "Some Conceptual Issues in Disability and Rehabilitation," *Sociology and Rehabilitation*, Marvin Sussman, ed. (Washington, D.C.: American Sociological Association, 1965), p. 103, cited and discussed in John Gliedman and William Roth, *The Unexpected Minority, Handicapped Children in America* (New York: Harcourt Brace Jovanovich, Inc., 1980), p. 428, n. 29 (hereafter cited as *The Unexpected Minority); Legal Rights of Handicapped Persons*, pp. 5–6.

[6] For a discussion of this controversy, and a presentation of some authorities on each side, *see The Unexpected Minority*, pp. 9–10, and 428–29, n. 29.

[7] Kent Hull, *The Rights of Physically Handicapped People* (New York: Avon Books, 1979), p. 15; *The Legal Rights of Handicapped Persons*, pp. 4–10.

[8] Merriam-Webster, *Webster's Third New International (Unabridged) Dictionary* (Springfield, Mass.: G.&C. Merriam Co., 1965), p. 1027, specifically adopted in State v. Turner, 3 Ohio App. 2d 5, 209 N.E. 2d 475, 477 (1965), and Chicago,

this broadly outlines the general concept, it does not fully explain the nature of the disadvantage or the achievement and gives no standard by which to gauge whether an activity is "unusually difficult." The terms "handicapped person" and "handicapped child" generally have narrower meanings referring to particular types of "disadvantages"—mental, physical, or emotional disability or impairment. This may be elaborated to include a list of specific conditions, such as blindness, deafness, mental retardation, and the like. These categories, although they appear to be clear and precise, reflect arbitrary judgments of degree. For example, the group of persons considered legally blind includes those who are totally blind and some with limited vision. But how limited must vision be for one to be considered legally blind? The standard has been set arbitrarily by social or legal convention. Consider, also, mental retardation, which is normally assessed by examining an individual's level of adaptive behavior[9] and intelligence test scores. How maladaptive must behavior be and how low must test scores be for one to be considered mentally retarded? The answers to these questions are neither firm nor infallible. Society has consciously developed the criteria to establish these standards.

Definitions using the terms handicap, disability, and impairment to define each other tend to be vague and not very helpful. Defining a handicap as "a physical or mental disability" or "a physical or mental impairment" is basically a tautology that does little to clarify the concepts. One must look further for modifying phrases or clauses that do the real job of defining the terms.

Legal and governmental definitions of handicap tend to be formal and specific, depending on the legislative, regulatory, or judicial intention. These definitions use several approaches.[10] One approach is to enumerate a long list of all the conditions chosen for inclusion in the definition. To define physical handicaps, for example, one would make a list of all the possible physical handicaps to be included (visual impairments, hearing impairments, speech impairments, absence of major extremities, paralysis, etc.).[11] Another approach to defining a handicap is to tailor the definition to the governmental purpose of the particular statute or regulation under consideration.[12] In terms of eligibility for special education services, for example, the handicapped child might be defined as one who, because of a mental or physical disability, needs special education services. A third approach involves deferral to professional determinations as to

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Milwaukee, St. Paul & Pacific R.R. Co. v. State Dep't of Industry, *Labor & Human Relations*, 62 Wis. 2d 392, 215 N.W. 2d 443, 446 (1974).

[9] Adaptive behavior refers to the effectiveness or degree to which an individual can meet the standards of personal independence and social responsibility expected of his or her age, social, and cultural group. *See The Legal Rights of Handicapped Persons*, pp. 38–40.

[10] *Legal Rights of Handicapped Persons*, p. 14.

[11] *E.g.*, Ariz. Rev. Stat. Ann. §15–1011.3 (1975); R.I. Gen. Laws, §28–5–6(H) (1979). *See* Providence Journal Co. v. Mason, 116 R.I. 614, 359 A.2d 682 (1976).

[12] *E.g.*, 42 U.S.C. §423(d)(2)(A) (1976); N.Y. Educ. Law §4401(1) (McKinney 1981).

what does or does not constitute a handicap.[13] For instance, mental illness might be defined as a condition defined as such by a psychiatrist. A mentally retarded person, under such an approach, would be one whom a doctor, a psychologist, or another professional has deemed mentally retarded.

Each of these approaches, if used alone, has its limitations. The first tends to be so specific that it may exclude persons with impairments or disabilities that cannot be neatly categorized. The second approach may be too vague for determining which persons were meant to be included. And the third type of definition avoids actually explaining the terms and defers to professionals.

To overcome the disadvantages that each approach by itself encounters, many legal and governmental definitions use a combination of these three approaches. The Social Security Act, for example, combines the second and the third approaches. It links the definition of disability with the ability to perform labor: a disability that does not affect one's ability to work is not considered a disability.[14] In addition, the statute defers to the medical profession to determine which conditions actually prevent gainful employment.[15]

An important and comprehensive definition of handicapped individual was provided in the Rehabilitation Act Amendments of 1974.[16] The prior definition under the Rehabilitation Act had been linked to employability and an individual's ability to benefit from vocational rehabilitation services[17] —the second definitional approach outlined above. In the 1974 amendments, Congress chose to add, for purposes of Title IV[18] and Title V[19] of the act, a totally new definition. Among other things, this statutory definition pertains to provisions requiring nondiscrimination against handicapped persons[20] and to affirmative action programs.[21] The statute states that handicapped individual "means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[22]

Department of Health and Human Services (HHS) regulations under the antidiscrimination provision, section 504 of the Rehabilitation Act of 1973,[23] expand upon and clarify this statutory definition of handicap. The regulations explain that "physical impairment" refers to any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting an important body system.[24] They add that mental impairments are "any mental or psycho-

[13] *E.g.*, Cal. Educ. Code §56500 (West 1978); Wis. Stat. Ann. §115.51(1) (1973).

[14] Section 223(d) of the Social Security Act, 42 U.S.C. §423(d) (1976).

[15] *Id.*

[16] Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, §111(a), 88 Stat. 1617 (1974).

[17] 29 U.S.C. §706(7)(A) (Supp. V 1981).

[18] 29 U.S.C. §§780-785 (Supp. V 1981).

[19] 29 U.S.C. §§791-794 (Supp. V 1981).

[20] 29 U.S.C. §794 (Supp. V 1981).

[21] 29 U.S.C. §793(a) (Supp. V 1981). The act as amended is described in chap. 3 in the section entitled "Rehabilitation Act of 1973."

[22] 29 U.S.C. §706(7)(B) (Supp. V 1981).

[23] 29 U.S.C. §794 (Supp. V 1981).

[24] In medically oriented terminology, the regulations list the pertinent body systems as follows: "neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine." 45 C.F.R. §84.3(j)(2)(i)(A) (1982).

logical disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[25] The regulations also define "major life activities" to mean "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[26]

Appended to the regulations is an "analysis of the final regulation" that clarifies and explains the regulatory language.[27] It explains that in order to provide a broad and comprehensive definition that would not exclude individuals who did not fit into traditional labeling categories, HHS intentionally refrained from listing specific diseases and conditions that constitute physical or mental impairments.[28] The HHS appendix explains, however, that the definition includes but is not limited to conditions such as: orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.[29]

Although the definition is broad, there are limitations. Only physical and mental handicaps are included; environmental, cultural, and economic disadvantages are not in themselves covered. Nor are prison records or age. Persons with these types of disadvantages must have a physical or mental handicap in order to be covered by the definition of handicapped person.[30] The appendix to the regulations strongly emphasizes that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it substantially limits one or more major life activities.[31]

[25] 45 C.F.R. §84.3(j)(2)(i)(B) (1982).

[26] 45 C.F.R. §84.3(j)(2)(ii) (1982).

[27] 45 C.F.R. §84.3(j), app. A, sub. A, no. 3 at 294–95 (1982) (hereafter referred to as "HHS appendix A").

[28] HHS appendix A at 294. This appendix declares that in addition to the breadth of the conditions described in the regulations, the statutory definition implicitly includes any physical or mental impairment whose precise nature is not currently known. HHS appendix A at 295. To commentators who had suggested that the definition of handicapped person is unreasonably broad and that the definition should be narrowed to cover only "traditional" handicaps, HHS replied that "it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent or progressive conditions that are most commonly regarded as handicaps." HHS appendix A at 294.

[29] HHS appendix A at 294. This definition of handicap has at times raised some controversy in that it has included conditions such as drug addiction and alcoholism under the definition of "physical and mental impairments." *(See* subpart A, no. 4 of HHS appendix A at 295–96.) Alcoholism and drug addiction are considered diseases by both the medical and legal communities, and HHS has had a long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act. Congress, however, has made a statutory exception relating to alcoholism and drug addiction in the area of employment. Congress states that the term handicapped individual does not "include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. §706(7)(B)) (Supp. V 1981).

[30] HHS appendix A at 294.

[31] *Id.* The regulations do not explain the phrase "substantially limits" because HHS "does not believe that a definition of this term is possible at this time." *Id.* It is interesting to contrast this definition with that used by the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. §6001(7)(D) (Supp. V 1981)). The statute states in pertinent part:

In addition to the first part of the definition, which deals with actual physical and mental impairments, the second and third parts of the statutory formulation constitute major conceptual advances over previous definitions.

The statutory definition includes persons who have a record of an impairment that limits one or more major life activities. This encompasses persons who had a handicapping condition but who have recovered. It includes, for example, persons who in the past had mental or emotional illness, heart disease, or cancer, but who no longer have the condition. Further, section 504 also protects from discrimination persons who have been incorrectly classified, as, for example, those misclassified as mentally retarded.

The third section of the statutory definition includes persons who are regarded as having an impairment that limits one or more major life activities.[32] This includes persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition. A person with a limp, for example, would be covered by this provision. Also included would be some persons who might not ordinarily be considered handicapped—those with disfiguring scars, for instance, as well as persons who have no physical or mental impairment but who are treated as if they were handicapped.[33]

Full understanding of the section 504 definition of a "handicapped person" requires familiarity with its three sources: the statute, the HHS regula-

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The term "developmental disability" means a severe, chronic disability of a person which—

(A) is attributable to a mental or physical impairment or combination of mental and physical impairments;

(B) is manifested before the person attains age twenty-two;

(C) is likely to continue indefinitely;

(D) results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic sufficiency; and

(E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

The Rehabilitation Act definition requires substantial limitation of one or more major life activities, while the Developmental Disability Act requires substantive functional limitations in three or more major life activities. The latter also has an age requirement for manifestation—before the person attains age 22. This age limit was adopted with the rationale that "individuals with disabilities occurring during their developmental period are more vulnerable and less able to reach an independent level of existence than other handicapped individuals who generally have had a normal developmental period on which to draw during the rehabilitation process" 42 U.S.C. §6000(a)(2) (1981). The act is discussed in chap. 3 in the section entitled "Education for All Handicapped Children Act." The phrase "developmental disability" also attempts to differentiate between a disability and a severe chronic disability. The distinction is a largely artificial, but important one, since persons who meet the criteria of the developmental disability definition have a wide range of services available to them under Federal developmental disabilities legislation.

[32] HHS appendix A at 295.

[33] *Id.*

tions, and the analysis that accompanies the regulations. The statutory language is extremely broad in scope. The HHS regulations define some of the terms and list broader categories of conditions that are included in the statutory language. The analysis accompanying the regulations is even more explicit, providing concrete examples and mentioning many of the specific conditions that are considered handicapping conditions. "In concert, these three elements produce a definitional approach that is simultaneously expansive, flexible, and specific."[34]

The section 504 explanation of handicapped person is probably the most comprehensive and useful definition to date. In providing the United States Commission on Civil Rights with jurisdiction over issues of discrimination on the basis of handicap, Congress expressly instructed the Commission to employ the definition of handicap set out in this section of the Rehabilitation Act.[35] Consequently, this monograph adopts the section 504 understanding of handicapped person as its working definition.[36]

Statistical Overview of Handicaps

A solid data base is necessary to the study of any group. Statistical information helps guide research, identify and better serve members of the group, and provide social indicators with which to measure the group's relative well-being within society over a period of time.[37] Perhaps the most important function of such information is to help ensure prudent and equitable policy decisions, many of which involve allocations of resources.

There is no single repository of adequate national data on the handicapped population.[38] Instead, demographic information must be culled from four distinct sources: service eligibility statistics, service delivery statistics, population surveys, and ad hoc studies. Each of

[34] *The Legal Rights of Handicapped Persons*, p. 29.

[35] 42 U.S.C. §1975c(e) (Supp. V 1981). The statutory cross-reference to the Rehabilitation Act definition does not bind the Commission in interpreting its jurisdictional grant to the HHS regulations and interpretation, although these may be informative and have persuasive value.

[36] *The Legal Rights of Handicapped Persons*, pp. 31–46, describes in some detail the various conditions that are generally considered handicaps under most statutory formulations. It identifies the following major categories: (1) hearing impairment, including deafness and hard of hearing; (2) visual impairment, including blindness and partial sightedness; (3) emotional disturbance and mental illness, including conditions classified as personality disorders, neuroses, psychoses, psychophysiological reactions, and autism; (4) epilepsy; (5) mental retardation; (6) orthopedic and neuromotor handicaps, including such conditions as paraplegia, quadriplegia, cerebral palsy, polio, muscular dystrophy, multiple sclerosis, spina bifida, arthritis, congenital malformation, amputation, and dwarfism; (7) speech impairment; (8) learning disabilities; (9) cosmetic disfigurement; and (10) other serious health impairments.

[37] U.S., Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978), pp. 1–2.

[38] In December 1981 the Bureau of Social Science Research, Inc., under contract with the National Institute of Handicapped Research, produced a report that examined existing statistical sources and made recommendations. This section relies heavily on the bureau's analysis. *See* Richard Roistacher, Engin Holmstrom, Albert Cantril, and John Chase, *Toward a Comprehensive Data System on the Demographic and Epidemiological Characteristics of the Handicapped Population: Final Report* (Washington, D.C.: Bureau of Social Science Research, Inc., 1981), pp. 2–3 (hereafter cited as *BSSR Report*).

these types of data has deficiencies. Service eligibility and delivery statistics are limited to those people who seek specific services from certain agencies; the data collection lacks breadth and standardization, and the records are often duplicative or incomplete.[39] Existing population surveys have a variety of problems. Some ask general questions on activity restrictions but yield no accurate or detailed disability information. Others are rich in diagnostic information but tend to exaggerate the rate of disability or fail to provide adequate information about functional limitations or activity restrictions. Other surveys report major restrictions but do not indicate their causes.[40] Ad hoc studies tend to be sharply focused examinations of local or State conditions. Because these limited studies are not designed to take national samples, it is not possible to extrapolate from them to the national population.[41]

The available statistics are difficult to aggregate because of inconsistent methodologies and definitions used by the different sources of data.[42] The primary sources of statistics on handicapped persons in the United States are: (1) the Social Security Administration (SSA), U.S. Department of Health and Human Services; (2) the National Center for Health Statistics (NCHS), U.S. Department of Health and Human Services; and (3) the Bureau of the Census, U.S. Department of Commerce. There are major differences in the methodologies these agencies employ to collect data[43]

[39] Ibid., p. 10.
[40] Ibid., p. 11.
[41] Ibid., p. 12.
[42] Ibid., p. 10. For example, the different usages of the terms "handicap" and "disability" in the Social Security Act, 42 U.S.C. §423 (d) (1976), and the Rehabilitation Act, 29 U.S.C. §§706(7)(A) and (B) (Supp. V 1981), hamper any correlation of the statistics generated by the various programs, since the samples are divergent by definition. Disability is also described differently for various age groups. It is expressed in terms of educational limitations for children and youths, work limitations for adults, and activity and self-care limitations for elderly people. *See BSSR Report,* pp. 12–15; 118 Cong. Rec. 3321 (1972). Types of data on handicapped people differ in additional ways. Some studies are limited to current activity limitations, while others focus primarily on chronic conditions; some count impairments, and others count individuals with impairments. *BSSR Report,* pp. 12–13.
[43] All three sources use a self-report method. Through questionnaires or personal interviews, people are asked to identify any work-disabling conditions that are present among their family members. The comprehensiveness and accuracy of the data are dependent on the respondents' awareness of, knowledge of, and willingness to report conditions as well as whether or not the conditions have had any noticeable effect. Unreported or undiagnosed conditions are not included in the estimates based on household interview data. *See* U.S., Department of Health and Human Services, National Center for Health Statistics, *Prevalence of Selected Impairments, United States—1977* (1977), p. 2 (hereafter cited as *Prevalence of Selected Impairments).*
Social and psychological factors may also inhibit self-reports of functional limitations. And because the surveys attempt to measure the effect of disability on work and housework, they may overlook and omit all the handicapped persons who do not describe themselves as "work-disabled." All these factors can cause sampling error. *See The Unexpected Minority,* n. 21, pp. 497–500.
Each of the reports is based on a sample of the population and, therefore, is subject to sampling error:
(a) U.S., Department of Commerce, Bureau of the Census, *1980 U.S. Census, Provisional Estimate of Social, Economic, and Housing Characteristics* (1982), p. 1 (hereafter cited as *1980 U.S. Census).* The data in this report are based on a special subsample of the full census sample, representing 8 percent of the sample census questionnaires or approximately 1.5 percent of the total national population.

and in the criteria each uses to measure disability,[44] which makes their data difficult to compare.

An idea of the overall number of handicapped people in America is important for determining the magnitude of the problem of discrimination against handicapped individuals. Because no single study adequately provides such a figure, estimates must be drawn from various surveys and statistical research. By deriving high and low figures from the most authoritative sources, it is possible to define a range within which the number of handicapped people in this country falls. Such an estimated range is the most accurate extrapolation that can be made and improves upon the widely divergent estimates sometimes quoted. For many purposes, such an estimated range of the number of handicapped persons can serve as a useful approximation.

In a chartbook published in December 1980, the Social Security Administration estimated that 17 percent of all adults of working age, some 21 million people, are limited in their ability to work.[45] These include: (a) severely disabled persons—those unable to work at all or unable to work regularly; (b) occupationally disabled persons—those able to work regularly but unable to do the same type of work as before the onset of disability or unable to work full time; and (c) persons with secondary work limitations—those able to work full time, regularly, and at the same occupation, but with limitations in the kind and amount of work they can perform.[46] Many people in this last category probably are not covered by the Rehabilitation Act's definition of handicapped,[47] which this monograph uses. Therefore, the SSA overall calculation should be revised to exclude the 5 percent of the working-age population,

(b) *Prevalence of Selected Impairments*, pp. 2, 39–44. The sample was composed of approximately 41,000 households, including 111,000 persons living at the time of the interview. Since the statistics are based on a sample, they will differ somewhat from figures that would have been obtained if a complete census had been used. The results are also subject to reporting and processing errors and errors due to nonresponse.

(c) U.S., Department of Health and Human Services, Social Security Administration, *Work Disabilities in the United States, a Chartbook* (1980) (hereafter cited as *SSA Chartbook*).

[44] For example: (a) The SSA study surveys persons of working age (18 to 64) in the civilian, noninstitutionalized population, including those who are limited in the amount or kind of work or housework they can perform. The limitations must have resulted from a chronic condition or impairment of at least 3 months' duration. *SSA Chartbook*, foreword. (b) The Decennial Census focuses more on labor force characteristics of the noninstitutionalized population (inmates and students are not included). The Census considers disabilities only when they exclude people from the labor force. Work disabilities must have lasted for 6 or more months to be considered disabilities; housework limitations are not included. The survey covers persons between the ages of 16 and 64. *1980 U.S. Census*, pp. 14–15, app. B–4. (c) The National Center for Health Statistics conducts the National Health Interview Survey (NHIS). The survey includes the civilian, noninstitutionalized population of all ages. It covers housework limitations, and a condition need not last for a specified number of months to be considered a disability. *Prevalence of Selected Impairments*, p. 2.

[45] *SSA Chartbook*, chart 1.

[46] Persons with limited ability to perform housework are included in this group. U.S., Department of Health and Human Services, Social Security Administration, *Disability Survey 1972, Disabled and Nondisabled Adults* (1980), p. 326.

[47] 29 U.S.C. §706(7)(B) (Supp. V 1981) covers "any person who (i) has a physical or mental impairment which *substantially limits one or more of such person's major life activities*" (emphasis added).

or 6.2 million people, that is the national population represented by the SSA secondary work limitations.[48] As a result, SSA statistics permit an estimate that roughly 12 percent of all adults of working age have disabilities that significantly limit their ability to work.

The 1980 U.S. Census estimated that 8.6 percent of noninstitutionalized persons between 16 and 64 years of age have a work disability.[49] This provides us with a range of 8.6 percent to 12 percent for this age group.

Some authorities have estimated that between 7 and 8 million children from ages 3 to 21 are handicapped.[50] For school year 1980–81, the Department of Education reported that 4,177,689 children and youths ages 3 to 21 were receiving special education services.[51] Applying these estimates to census data, the proportion of school-aged children with handicaps ranges from 5.7 to 9.4 percent.[52] The Department of Education, Office for Civil Rights (OCR), estimates that 9.1 percent of the total elementary and secondary enrollment require special education.[53] Although correlation between census data and the other studies mentioned is problematic, the best available estimates are those that put the figure somewhere between 5.7 and 9.4 percent.

The estimates of handicapped and disabled persons over the age of 65 are even less precise than those for the rest of the population. According to the White House Conference on Handicapped Individuals, approximately 35 percent of the elderly are handicapped.[54] Quoting a NCHS study, the 1981 White House Conference on Aging noted that although 80 percent of the elderly reported some type of chronic condition, only 20 percent reported some limitation in the amount and kind of usual activity.[55]

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[48] *SSA Chartbook*, chart 1.

[49] Of 144,560,822 noninstitutionalized persons 16 to 64 years of age, 12,402,995 were estimated to have a work disability. *U.S. Census 1980*, p. 14.

[50] *See* Bowe, *Handicapping America*, pp. 16–17; Temple Developmental Disabilities Center, *Manpower Projections for Developmental Disabilities in the 1980s* (Philadelphia: Temple University, 1974), p. 80; 20 U.S.C. §1400(b) (Supp. IV 1980).

[51] U.S., Department of Education, Special Education Programs, *Fourth Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act* (1982), p. 3 (hereafter cited as *Fourth Annual Report to Congress on the Implications of Public Law 94-142).*

[52] These figures are very gross estimates, in part because the figures for the 3 to 21 age group must be compared with census figures for the 0 to 19 age group.

[53] OCR projected that 3,635,064 children require special education. U.S., Department of Education, *1980 Elementary and Secondary Schools Civil Rights Survey: National Summaries*, by DBS Corporation for the Office for Civil Rights (1982), table 1. Based on the 1970 census figures, James Kakalik estimated that 11.4 percent of the population to age 21 were handicapped. Gary D. Brewer and James S. Kakalik, *Handicapped Children, Strategies for Improving Services (New York: McGraw-Hill, 1979), pp. 78–9. This figure is probably an overestimate.* See The Unexpected Minority, Children in America,*p. 5 and n. 11, p. 423.*

[54] *U.S., Department of Health, Education, and Welfare, Office of Human Development, Special Concerns*, The White House Conference on Handicapped Individuals (1977), p. 110. The 1981 White House Conference on Aging, *Chartbook on Aging in America* (Washington, D.C.: 1981), p. 80.

[55] By extrapolating from Social Security Administration figures for the 55 to 64 age group, it is fairly certain that at least 25 percent of those over 65 have severe disabilities that render them unable to work at all or to work regularly. The SSA estimates that 25 percent of the persons aged 55 to 64 have disabilities of these types. It is reasonable to assume that the proportion of

Using the ranges adopted for the different age groups[56] in conjunction with 1980 population data, it can be estimated that handicapped persons represent between 9 percent and 13.7 percent of the population.[57] These figures are by no means certain, but they are the most reliable available at the present time.[58]

Beyond providing general estimates of the overall prevalence of handicaps, available statistical information has other valuable uses. In spite of methodological limitations and variations that sometimes make data from different sources difficult to combine, many studies are scrupulously performed and draw valid and statistically supported conclusions within their specifically defined area of inquiry. Studies of the numbers of people in mental health and mental retardation facilities, for example, or of handicapped children receiving special education, or of the number of handicapped workers employed by Federal agencies, can all be performed responsibly and accurately.[59] There are also some useful data illustrating the distribution of various types of impairments. Available data are particularly useful for suggesting correlations between handicaps and other sociological factors, such as age, race, marital status, and military service. Problems with methodology employed in certain studies as discussed above do not generally affect the internal validity of such studies in identifying important characteristics of the handicapped population.

Age

The chance of being disabled increases with age. According to one study, adults between the ages of 55 and 64 are 3 times more likely than those between 35 and 44 to have severe or occupational disabilities and 10 times more likely than those between 18 and 34 to be severely disabled.[60]

Persons 65 years of age and older reported at least two to three times as many physical impairments, except for speech and orthopedic impairments of the back or spine, than the average for all age groups. Older people reported visual impairments four times greater and hearing impairments five times greater than the average for all age groups.[61]

Race

Some minority groups are more likely than whites to have handicaps. According to one study, 13 percent of the black population and 13 percent of the Hispanic population reported severe disabilities,

individuals with such disabilities does not diminish after the age of 64. *SSA Chartbook*, chart 3.

[56] See app. C, table 1, of this monograph.

[57] See app. C, table 2, of this monograph.

[58] Some have estimated that there are 36 million disabled Americans, while others have put the figure closer to 50 million. These figures represent 16 percent and 22.1 percent, respectively, of the total population of the United States. *See Handicapping America*, p. 17. *See also* "Uncertainty in Figures," *New York Times*, Feb. 13, 1977, sec. 4, p. 8, col. 4.

[59] *See* chap. 2 in the section entitled "Extent of Handicap Discrimination."

[60] *SSA Chartbook*, chart 3. Another study found that between the ages of 35 and 44, 10.9 percent of the population was disabled while between the ages of 55 and 64, 29.5 percent of the population was disabled. U.S., Department of Commerce, Bureau of the Census, *1976 Survey of Income and Education* (hereafter referred to as *SIE Study*), as reported in Congressional Research Service, *Digest of Data on Persons with Disabilities* by Rehabilitation Group, Inc. (Washington, D.C.: U.S. Government Printing Office, 1979), p. 17 (hereafter referred to as *Digest*).

[61] *Prevalence of Selected Impairments*, pp. 4–5.

while 8 percent of the white population and 6 percent of the members of other races reported they were unable to work at all or unable to work regularly due to a disability.[62] Another study found that 19.4 percent of the blacks and 12.6 percent of the whites reported a work disability.[63]

Although less than 20 percent of the sample population in another study was nonwhite, nonwhites reported about 50 percent of the physical impairments in 4 of 10 categories. In all 10 categories, nonwhites were at least 35 percent of the impaired group, and in 7 categories, they were at least 40 percent.[64]

Marital Status

Studies suggest that disabled people are less likely than nondisabled people to get married and are more likely to be divorced or separated.[65] While 68 percent of the nondisabled population are married, only about 63 percent of severely disabled persons are married.[66] Severely disabled persons are about twice as likely as nondisabled persons to be divorced or separated.[67]

Military Service

In 1981, according to the Veterans Administration, 2,279,064 veterans were receiving service-connected disability compensation. Approximately 387,000 of these had disabilities rated at 60 percent or more, some 619,000 had disability ratings between 30 and 60 percent, and approximately 1,270,000 had disabilities rated at less than 30 percent.[68]

Types of Impairments

According to SSA figures, 65 percent of both severely and partially disabled persons reported musculoskeletal conditions.[69] Next most often reported by severely disabled persons were cardiovascular problems,[70] followed by mental conditions,[71] digestive conditions,[72] and respiratory conditions.[73] Another study found that the most disabling conditions were musculoskeletal, circulatory, hearing, emotional, digestive, respiratory, visual, and neurological.[74]

Of the approximately 9.5 million persons regarded as having developmental disabilities, according to another study, approximately 60 percent are mentally

[62] *SSA Chartbook*, chart 4.
[63] *See Digest*, pp. 16–17.
[64] *Prevalence of Selected Impairments*, pp. 22–34.
[65] Barbara Wolfe, "How the Disabled Fare in the Labor Market," *Monthly Labor Review*, September 1980, pp. 49, 51; Richard V. Burkhauser and Robert H. Haveman, *Disability and Work* (Baltimore: Johns Hopkins Univ. Press, 1982), p. 11 (hereafter cited as *Disability and Work*).
[66] *Disability and Work*, p. 11.
[67] *SSA Chartbook*, chart 6.
[68] U.S., Veterans Administration, Office of Reports and Statistics, *Disability Compensation Data* (October 1981).
[69] These include arthritis or rheumatism, trouble with back or spine, missing legs or feet, missing arms or hands, and chronic stiffness. *SSA Chartbook*, chart 11.
[70] These include heart trouble, stroke, and other arterial-vascular problems. Ibid.
[71] These include mental illness, mental retardation, alcohol or drug problems, and chronic nervous problems. Ibid.
[72] These include gall bladder or liver trouble, stomach ulcer, chronic stomach trouble, and a hernia or rupture. Ibid.
[73] These include tuberculosis, chronic bronchitis, emphysema, chronic lung trouble, asthma, and respiratory allergies. Ibid.
[74] California Department of Rehabilitation, *Executive Summary for the California Disability Survey*, prepared by J. Merrill Shanks, Survey Research Center, University of California, Berkeley, and Howard E. Freeman, Institute for Social Science Research, University of California, Los Angeles (Sacramento, California, 1980), table E5–3.

retarded, 25 percent have epilepsy, 10 percent have cerebral palsy, and just under 1 percent are autistic.[75]

In 1982 the Department of Education reported that the greatest numbers of children and youth participating in special education programs exhibited speech impediments, learning disabilities, mental retardation, or emotional disturbance.[76]

The foregoing culls from existing data an overview of some statistical facts about handicapped persons. Although this information provides a general feel for the size and makeup of the handicapped population, its imprecision underscores the need for more reliable, standardized, and comprehensive data. Better statistical information would greatly enhance the ability to plan and deliver services to handicapped persons, to monitor the status and treatment of handicapped persons, and to develop legislative and administrative initiatives and appropriate remedial programs.

[75] EMC Institute, *Program Issue Review: Characteristics of the Developmentally Disabled* (developed under contract to HEW, Office of Human Development). As to the sources of such developmental disabilities data, a report making use of them has noted:

> The EMC Institute prepared these data from information supplied by the fiscal year 1978 state developmental disability plans as required by P.L. 91-517, as amended by P.L. 94-103, and by the Developmental Disabilities Office of the Office of Human Development of the Department of Health, Education, and Welfare. It is difficult to estimate the errors in these data. There are several reasons for this: (1) not all of the 54 State developmental disabilities plans included all the population data specified by the guidelines; (2) the year for which the developmentally disabled population was projected varied among the individual states from 2980 to 1985; (3) the definition of "substantial handicap" varies widely among individual states, and; (4) the accuracy of state estimates varies, because some states base their estimates on special survey data, and others use prevalence data from national organizations. There is no way to tell what methodology was used to make the estimates.

Digest, p. 12.

[76] *Fourth Annual Report to Congress on the Implementation of Public Law 94-142*, p. 3. The breakdown by impairments is as follows: learning disabled (1,468,014); speech impaired (1,170,484); mentally retarded (844,180); emotionally disturbed (348,954); other health impaired (98,653); deaf and hard of hearing (81,363); multihandicapped (70,460); orthopedically impaired; (59,663) visually handicapped (33,005); deaf and blind (2,913).

Chapter 2

Discrimination Against Handicapped People

Most people do not harbor conscious prejudices against handicapped people or even realize that such prejudice is a serious problem in American society. Many perceive handicapped people's disadvantaged social and economic status as resulting from innate limitations caused by handicaps. Authorities from every branch of government have concluded, however, that prejudice and discrimination are major causes of the disadvantages confronting handicapped people.

This chapter focuses on how handicapped people fare in society and the ways society, instead of accommodating, frequently misconstrues, overreacts to, or ignores differences in individual mental and physical abilities. The chapter traces the historical isolation of handicapped people, examines various types of prejudice against them, and describes the patterns, practices, and forms of discrimination on the basis of handicap.

Historical Background

In recent years, some authorities have called handicapped persons "a hidden population. . .unknown to the communities and individuals around them,"[1] "unfamiliar to many Americans;. . .strangers in a strange land,"[2] "a forgotten minority,"[3] and "social outcasts."[4] Their isolated status is not a new development, however. Recorded history documents many examples of segregation and persecution by various societies, including our own, of people

[1] 118 Cong. Rec. 3320-21 (Feb. 9, 1972) (statement of Sen. Williams).

[2] Frank G. Bowe, statement, *Civil Rights Issues of Handicapped Americans: Public Policy Implications*, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., May 13-14, 1980, p. 10 (hereafter cited as *Consultation).*

[3] Bruce Vodicka, "The Forgotten Minority: The Physically Disabled and Improving Their Physical Environment," *Chi.-Kent L. Rev.*, vol. 48 (1971), p. 215.

[4] Kent Hull, *The Rights of Physically Handicapped People* (New York: Avon Books, 1979), p. 29.

who differed from what was considered "normal."[5]

When Europeans settled colonial America, they devoted their energies primarily to survival and placed a premium on physical stamina, hard work, and material success. Incapacity and dependency were undesirable in such an environment.[6] Laws in the Thirteen Colonies excluded settlers who could not demonstrate an ability to support themselves independently. Immigration policy forbade people with physical, mental, or emotional disabilities to enter the country.[7] It was the family's responsibility to care for any members who were born with handicaps or became handicapped through illness, injury, or other causes.[8] Fear, shame, and lack of understanding led some families to hide or disown their handicapped members or allow them to die.[9]

Handicapped people without families and those whose families were unable or unwilling to support them were "farmed out" to stay with people who received public assistance for providing room, board, and care.[10] Placement was usually based on an "inverse auction" in which whoever made the lowest bid received the contracts for providing the care. Such a system continued into the latter half of the 19th century, when public concern over abuses—including recorded instances where care providers collected their fees and then locked their charges in the attic to starve or freeze to death—led to reform.[11]

Some authorities have suggested that societal perceptions of people with handicaps as dependent and useless may have influenced those who survived to refrain from even attempting to become self-reliant.[12] Nonetheless, even in colonial times, some handicapped people achieved success and earned the respect of their communities. Early examples include Peter Stuyvesant, the Dutch director-general of New Amsterdam, and Gouverneur Morris, codrafter of the American Constitution and later a U.S. Senator and diplomat, both of whom had leg amputations.[13]

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[5] Instances of ridicule, torture, imprisonment, and execution of handicapped people throughout history are not uncommon, while societal practices of isolation and segregation have been the rule. Frank Bowe, *Handicapping America* (New York: Harper & Row, 1978), pp. 3–8; R.C. Scheerenberger, *A History of Mental Retardation* (Baltimore: Brookes Publishing Co., 1983), pp. 3–20, 31–47; Jacobus ten Broek and Floyd W. Matson, "The Disabled and the Law of Welfare," *Cal. L. Rev.*, vol. 54 (1966), pp. 809, 811; Marcia Burgdorf and Robert Burgdorf, Jr., "A History of Unequal Treatment," *Santa Clara Lawyer*, vol. 15 (1975), pp. 861–91 (hereafter cited as "History of Unequal Treatment"); Wolf Wolfensberger, "The Origin of our Institutional Models," in *Changing Patterns in Residential Services for the Mentally Retarded*, ed. Robert B. Kugel and Wolf Wolfensberger (Washington, D.C.: President's Committee on Mental Retardation, 1969) pp. 65–66; Frances Koestler, *The Unseen Minority* (New York: David McKay, 1976), pp. 1–12.

[6] President's Committee on Employment of the Handicapped, "Disabled Americans: A History," *Performance*, vol. 27, nos. 5, 6, 7 (November-December 1976, January 1977), pp. 1–2 (hereafter cited as "Disabled Americans: A History").

[7] Bowe statement, *Consultation*, p. 9.

[8] "Disabled Americans: A History," p. 3.

[9] Bowe statement, *Consultation*, p. 9.

[10] "Disabled Americans: A History," pp. 3–5.

[11] Lloyd Burton, "Federal Government Assistance for Disabled Persons: Law and Policy in Uncertain Transition," in *Law Reform in Disability Rights*, vol. 2 (Berkeley: Disability Rights Education and Defense Fund, 1981), p. B–5.

[12] Bowe statement, *Consultation*, p. 9.

[13] "Disabled Americans: A History," pp. 10–12.

Based partly on State legislative reports criticizing prior approaches as inefficient, in the early 1820s public programs shifted to more organized, institutional care for indigent and handicapped people.[14] Although some facilities provided care for people with particular types of handicaps,[15] the typical approach that emerged was to confine handicapped people in almshouses or poorhouses, along with juvenile delinquents, prostitutes, elderly people, and poor people.[16] Most of these facilities were merely custodial, and many were unsanitary and overcrowded.[17]

Concern over the inadequacies of the local almshouse system prompted reformers like Dorothea Dix to push for State supervision of institutional facilities and for more specialized care.[18] As a result, in the 1850s, State facilities for various groups of handicapped people proliferated amid high hopes that training and education would allow people to leave the institutions and live in their own communities.[19] Although these programs apparently achieved some success, they were largely replaced between 1870 and 1890 by facilities operating on a new model focused on protecting handicapped people from society. This philosophy emphasized "benevolent shelter" and resulted in large institutions housing great numbers of disabled people far from population centers. These programs generally provided no training that might enable handicapped residents to return to their communities. Some residents were taught skills such as farming, but only to help defray institutional costs.[20]

Ironically, the protective isolation model, premised upon a belief that handicapped persons needed to be protected from the hardships incident to normal society, was replaced in the late 1800s and early 1900s by a growing sentiment that society needed protection from handicapped people.[21] The Social Darwinism of the late 19th century spawned a eugenics movement, which peaked in the United States in the 1920s. This movement was based on the notion that mental and physical disabilities were the underlying source of nearly all social problems and were occurring with ever-

[14] Ibid., p. 19.

[15] In 1773 the Eastern State Hospital at Williamsburg, Virginia, was founded especially to treat mental illness. The Massachusetts Asylum for the Blind (later the Perkins Institute) opened in 1832. The first American Asylum for the Deaf was started in Hartford, Connecticut, in 1817. The first private school in America for educating severely mentally retarded children was created in 1848. Ibid., pp. 20–28.

[16] Ten Broek and Matson, "The Disabled and The Law of Welfare," p. 811; "Disabled Americans: A History," p. 20. Some States already had almshouses, but a dramatic increase in their numbers occurred in the 1820s and 1830s. "Disabled Americans: A History," pp. 5, 19–20.

[17] Bowe statement, *Consultation*, p. 9; "Disabled Americans: A History," p. 20.

[18] "Disabled Americans: A History," p. 20. Dix also labored unsuccessfully for a Federal act establishing land grants for asylums to provide care for handicapped people, at a time when the Federal Government was providing many thousands of acres of Federal land to States for various public purposes. When Congress finally passed such a measure in 1854, President Franklin Pierce vetoed it on constitutional grounds as an attempt to make "the Federal Government the great almoner of public charity throughout the United States." Ibid., pp. 21–22; Burton, "Federal Government Assistance for Disabled Persons," p. B–4.

[19] Wolfensberger, "The Origin and Nature of Our Institutional Models," pp. 89–92.

[20] Ibid., pp. 94–100.

[21] Ibid., pp. 100–105.

increasing frequency due to reproduction by unfit persons.[22] Some observers saw the spreading of handicapping conditions through heredity as the single most serious problem facing America.[23] Handicapped individuals were frequently referred to as "mere animals," "sub-human creatures," and "waste products" who were draining the economy and producing only "pauperism, degeneracy, and crime."[24]

To isolate handicapped people,[25] some professionals advocated institutionalization for even minor disabling conditions. The costs of maintaining the institutions, however, soon became burdensome for many communities. Reducing per capita costs allowed institutions to admit more people on a given budget.[26] These economies of scale fostered large, understaffed institutions often providing minimal custodial services to residents.[27]

By the end of the 1920s, scientists had discredited many of the underpinnings of eugenics, and the belief that handicapped people were a social menace waned. Experts challenged the eugenicists' overemphasis on heredity as the cause of disabilities and refuted theories that the human race was deteriorating genetically.[28] This undercut the primary rationale for segregating handicapped people from the rest of society, but the large State residential institutions had established a momentum of their own.[29] Institutionalization had become American society's automatic response to the question of how to deal with the handicapped population:

> [W]hether young or old; whether borderline or profoundly retarded; whether physically handicapped or physically sound; whether deaf or

[22] *See* Robert L. Burgdorf, Jr., and Marcia Pearce Burgdorf, "The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons," *Temp L. Q.*, vol. 50, no. 4 (November 1977), pp. 997–1000 and authorities cited therein (hereafter cited as "Wicked Witch: Sterilization of Handicapped Persons").

[23] Wolfensberger, "The Origin and Nature of Our Institutional Models," pp. 102–05; "Wicked Witch: Sterilization of Handicapped Persons," p. 998. An article calling for a sterilization statute in Kentucky, for example, issued the following warning:

> Since time immemorial, the criminal and defective have been the "cancer of society." Strong, intelligent, useful families are becoming smaller and smaller; while irresponsible, diseased, defective families are becoming larger. The result can only be race degeneration. To prevent this race suicide we must prevent the socially inadequate persons from propagating their kind, i.e., the feebleminded, epileptic, insane, criminal, diseased, and others.

Note, "A Sterilization Statute for Kentucky," *Ky. L.J.*, vol. 23 (1934), p. 168.

[24] Wolfensberger, "The Origin and Nature of Our Institutional Models," pp. 102, 106–07.

[25] Eugenicists advocated several strategies for dealing with the propogation of handicapped people. These included prohibitions on marriage and sexual intercourse, compulsory sterilization, segregation from the community and from the opposite sex, and euthanasia. "Wicked Witch: Sterilization of Handicapped Persons," pp. 998–99. Some of these measures were difficult to enact or enforce or were struck down by the courts as unconstitutional. Ibid., pp. 1000–01.

[26] Wolfensberger, "The Origin and Nature of Our Institutional Models," p. 118.

[27] Some institutions actually competed to see which could reduce costs the most, with little concern for the welfare of residents or the quality of their environment. Ibid., p. 122. "Farm colonies" exploiting the labor of mentally retarded residents became common. Ibid., pp. 119–22.

[28] "Wicked Witch: Sterilization of Handicapped Persons," pp. 1007–08, and the authorities cited therein.

[29] Wolfensberger, "The Origin and Nature of Our Institutional Models," pp. 129–31.

> blind; whether rural or urban; whether from the local town or from 500 miles away; whether well-behaved or ill-behaved[,] [w]e took them all, by the thousands, 5,000 to 6,000 in some institutions. We had all the answers in one place, using the same facilities, the same personnel, the same attitudes, and largely the same treatment.[30]

Concern for disabled First World War veterans prompted Congress to pass legislation creating "soldier rehabilitation" programs in 1918.[31] In 1920 the Fess-Kenyon Act created a vocational rehabilitation program embracing persons "disabled in industry or in any legitimate occupation."[32] This program was extended periodically and became permanent with passage of the Social Security Act of 1935.[33] With the return of Second World War veterans, the range of rehabilitation services available under the act was expanded and extended to mentally disabled persons.[34] Another postwar measure, passed in 1948, prohibited discrimination based on physical handicap in United States Civil Service employment.[35]

In the last 10 years, through laws such as the Education for All Handicapped Children Act[36] and the Rehabilitation Act of 1973,[37] Congress has guaranteed basic civil rights to handicapped people. Naturally, these laws could not instantaneously remedy the effects that years of isolation have had on handicapped people:

> Disabled people have been out of the mainstream of American life for two hundred years. And these years have seen the construction of modern American society—its values, its heritage, its cities, its transportation and communications networks. So that now, when they are coming back into our society, the barriers they face are enormous.[38]

Because of the historical isolation of handicapped people, many nonhandicapped people tend to have had little contact with handicapped people and know little about their abilities and disabilities.[39] In addition, because handi-

[30] Ibid., p. 143.

[31] Vocational Rehabilitation Act, ch. 107, 40 Stat. 617 (1918).

[32] Pub. L. No. 66-236, 41 Stat. 735 (1920).

[33] Pub. L. No. 74-271, 49 Stat. 620 (1935). In 1936 the Randolph-Sheppard Vending Stand Act was passed, authorizing vending facilities in public buildings for blind people to sell such items as newspapers and tobacco. Pub. L. No. 74-732, 49 Stat. 1559 (1936), codified as amended at 20 U.S.C. §§107-107f (1976 and Supp. V 1981). The Wagner-O'Day Act of 1938 created an obligation upon the Federal Government to buy products from workshops for blind people. Pub. L. No. 75-739, 52 Stat. 1196 (1938), codified as amended at 41 U.S.C. §§46-48c (1976 and Supp. IV 1980).

[34] Pub. L. No. 78-113, 57 Stat. 374 (1943).

[35] Act of June 10, 1948, Pub. L. No. 80-617, 62 Stat. 351.

[36] 20 U.S.C. §§1401-1461 (1976 and Supp. V 1981); chap. 3 in the section entitled "Education for All Handicapped Children Act."

[37] 29 U.S.C. §§701-794 (1976 and Supp. IV 1980); chap. 3 in the section entitled "Rehabilitation Act of 1973."

[38] Bowe, *Handicapping America*, p. x.

[39] One authority has observed:

> [D]isabled individuals are unfamiliar to many Americans; one way of putting it is to say that in many respects disabled persons are strangers in a strange land. Attitudes of the general public toward disabled individuals, accordingly, are quite negative. Disabilities

capped people have been out of sight, they often have been out of mind when societal planning and organization have occurred.

Prejudice Toward Handicapped People

Prejudice distorts social relationships by overemphasizing some characteristic such as race, gender, age, or handicap.[40] Physical and mental differences among people do exist, and awareness of individual differences and sensitivity to the actual needs and specific limitations of handicapped people are important parts of relating to them in an appropriate and positive manner. But imputing more difference to a handicapped person than actually exists is a form of prejudice.[41]

Prejudice toward handicapped people is similar in some ways to other kinds of prejudice and may share some common sources, such as the urge to classify and the tendency to form in-groups and out-groups.[42] Some authorities have suggested that various types of prejudice are connected and that people who are prejudiced in one area tend to be prejudiced in other areas.[43] Another common aspect of prejudice is disparity of power, where people fall into roles based on assumptions of superiority and inferiority.[44]

Sociological and psychological studies of attitudes towards handicapped people are neither refined nor comprehensive. Although no two persons' attitudes are exactly alike, the professional literature[45] discloses some common strains

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engender fear and discomfort in many "temporarily able-bodied" individuals, so much so that the average American finds it very difficult to see beyond the disability to the abilities.

Bowe statement, *Consultation*, p. 10.

[40] For an analytic framework and diagram of the concepts of prejudice and discrimination, *see* Joe R. Feagin and Douglas Lee Eckberg, "Discrimination: Motivation, Action, Effects, and Context," *Annual Review of Sociology*, vol. 6 (1980), pp. 1–20. The authors posit that the concept of discrimination includes the following dimensions: (a) motivation, (b) discriminatory action, (c) effects, (d) the relation between motivation and action, (e) the relation between action and effects, (f) the immediate organizational context, and (g) the larger societal context. Ibid., p. 2.

[41] Research has suggested that for children a visible handicap may be more significant than race in deterring friendships. Constantina Safilios-Rothschild, "Social and Psychological Parameters of Friendship and Intimacy for Disabled People," in *Disabled People as Second-Class Citizens*, ed. Myron G. Eisenberg, Cynthia Griggins, and Richard J. Duval (New York: Springer Publishing Co., 1982), p. 43.

[42] *See, e.g.*, Myron G. Eisenberg, "Disability as Stigma," in *Disabled People as Second-Class Citizens*, pp. 4–5; John S. Hicks, "Should Every Bus Kneel?" in *Disabled People as Second-Class Citizens*, pp. 22–24; Karl Menninger, *The Vital Balance* (New York: Viking Press, 1963), pp. 9–34.

[43] For an overview and summary of such studies, see R. William English, "Correlates of Stigma Towards Physically Disabled Persons," in *Social and Psychological Aspects of Disability*, ed. Joseph Stubbins (Baltimore: University Park Press, 1977), pp. 218–19. *See also* Wolf Wofensberger, *The Principle of Normalization in Human Services* (Toronto: National Institute on Mental Retardation, 1972), p. 14; T.W. Adorno and others, *The Authoritarian Personality* (New York: W.W. Norton & Co., 1950); Larry D. Baker, "Authoritarianism, Attitudes Toward Blindness, and Managers: Implications for the Employment of Blind Persons," *The New Outlook for the Blind*, vol. 68, no. 7 (September 1974), pp. 308–14; Bowe, *Handicapping America*, pp. 122–24.

[44] John Gliedman and William Roth, *The Unexpected Minority* (New York: Harcourt Brace Jovanovich, 1980), pp. 383–84; Eisenberg, "Disability as Stigma," p. 5. *Cf.*, U.S., Commission on Civil Rights, *Racism in America and How to Combat It* (1970).

[45] See the studies summarized in John Schroe-

and consistent patterns regarding prejudice based on handicap. The following summarizes four of the major types.

Discomfort

Psychological studies indicate that interaction with handicapped people, particularly those with visible handicaps, commonly produces feelings of discomfort and embarrassment in nonhandicapped people.[46] Such sentiments occur especially among people who lack the experience to know what limitations result from handicaps and what types of things are appropriate to say or do in response. "One may like and respect a handicapped person and still stammer, overreact, or fall mute time and time again because one doesn't know what to do next."[47] These reactions also involve issues of how to behave toward members of less advantaged groups without unintentionally being patronizing or false.[48] Uneasiness may also reflect deeper fears. Psychologically, handicaps may be symbolic evidence of everyone's vulnerability to death, disease, and injury, which may force people to face "unpleasant truths about [themselves] or. . .the harsh realities of [their] environment."[49]

Whatever the cause, handicapped people encounter the reaction of aversion every day.[50] One author reported that his lawyer was reluctant to associate with him and ill at ease having lunch with him in the course of a personal injury suit over the accident that had caused his handicap.[51] According to another writer, who is paralyzed from the shoulders down: "I have been served meals in separate dining areas of restaurants since, as the owners were quick to point out, I might upset the other customers and lessen their enjoyment of the meal."[52] More frequent than such clear-cut situations, however, is the subtle but recognizable unease that commonly greets the handicapped person who ventures out into the world:

> Whether the handicap is overtly and tactlessly responded to as such or, as is more commonly the case, no explicit reference is made to it, the underlying condition of heightened, narrowed awareness causes the interaction to be articulated too exclu-

del, *Attitudes Toward Persons With Disabilities: A Compendium of Related Literature* (Albertson, N.Y.: Human Resources Center, 1979) and Joseph Stubbins, ed., *Social and Psychological Aspects of Disability* (Baltimore: University Park Press, 1977).

[46] Hull, *The Rights of Physically Handicapped People*, pp. 32–33, 41, n. 8. *See also*, Gliedman and Roth, *The Unexpected Minority*, pp. 380–81; Eisenberg, "Disability as Stigma," p. 9; Amy Jo Gittler, "Fair Employment and the Handicapped: A Legal Perspective," *DePaul L. Rev.*, vol. 27 (1978), p. 469; Harlan Hahn, "Paternalism and Public Policy," *Society*, vol. 20, no. 3 (March–April 1983), p. 44 (hereafter cited as "Paternalism and Public Policy").

[47] Gliedman and Roth, *The Unexpected Minority*, p. 380.

[48] Ibid.

[49] Constantina Safilios-Rothschild, "Prejudice Against the Disabled and Some Means to Combat It," *Social and Psychological Aspects of Disability*, p. 265.

[50] Leonard Kriegel, "Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro," *American Scholar*, vol. 38 (1969), p. 413. "He does not even possess the sense of being actively hated or feared by society, for society is merely made somewhat uncomfortable by his presence." Ibid.

[51] Jack Achtenberg, "Crips' Unite to Enforce Symbolic Laws: Legal Aid for the Disabled: An Overview," *San Fern. V. L. Rev.*, vol. 4, no. 2 (1975), p. 178.

[52] Gittler, "Fair Employment and the Handicapped," p. 969, n. 52.

> sively in terms of it. This. . .is usually accompanied by one or more of the familiar signs of discomfort and stickiness: the guarded references, the common everyday words suddenly made taboo, the fixed stare elsewhere, the artificial levity, the compulsive loquaciousness, the awkward solemnity.[53]

Patronization and Pity

Research has documented that nonhandicapped people often feel and act on moral obligations to help handicapped people.[54] Numerous individuals and organizations spend time and money in telethons, benefit sports contests, and other charitable events to support diverse research efforts, facilities, and activities making real and important contributions to handicapped people and their families. Charitable impulses, however, can become pity or patronization toward the intended beneficiaries:[55]

> Usually, this form of pity perception is benevolent and is accompanied by compassion and acceptance, although it may be devoid of respect for the deviant person. However, there also exists another variant of the pity perception, upheld more by a sense of duty than compassion. Particularly persons possessing a strongly moralistic conscience but not much genuine humanism are apt to perceive deviant persons as objects of sour charity.[56]

Charitable acts can be accompanied by attitudes denying handicapped people respect or dignity. Some critics have questioned the motivation of well-intentioned programs and the way they may reflect and affect attitudes about handicapped people,[57] with one observer characterizing oversolicitousness toward handicapped people as "benevolent paternalism."[58] Another has argued that at their root such attitudes reflect "a belief that such poor, blighted creatures as these must be protected from the world, instead of helped to become part of it."[59]

[53] Fred Davis, "Deviance Disavowal: The Management of Strained Interaction by the Visibly Handicapped," *Social Problems*, vol. 9 (1961), p. 123. *See also*, "Paternalism and Public Policy," p. 44.

[54] Eisenberg, "Disability as Stigma," p. 6.

[55] Wolfensberger, *The Principle of Normalization in Human Services*, p. 20; "Paternalism and Public Policy," p. 44. There appears to be a consoling effect in knowing that others are worse off than oneself. According to the ancient Chinese adage, "I was angered for I had no shoes, then I met a man who had no feet." Selwyn G. Champion, *Racial Proverbs: A Selection of the World's Proverbs Arranged Linguistically* (London: George Routledge & Sons, 1938), p. 376.

[56] Wolfensberger, *The Principle of Normalization in Human Services*, p. 20.

[57] Ruth-Ellen Ross and I. Robert Freelander, *Handicapped People in Society: A Curriculum Guide* (Burlington, Vt.: Univ. of Vermont, 1977), p. 12; Leonard Kriegel, "Claiming the Self: The Cripple as American Male," in *Disabled People as Second-Class Citizens*, ed. Myron G. Eisenberg, Cynthia Griggins, and Richard J. Duval (New York: Springer Publishing Co., 1982), p. 58; *New York Times*, Feb. 13, 1977, p. E–8.

[58] Hull, *The Rights of Physically Handicapped People*, p. 21.

[59] U.S., Department of Health, Education, and Welfare, Social and Rehabilitation Service, *Legal Rights of the Disabled and Disadvantaged*, by Richard C. Allen (Washington, D.C.: Government Printing Office, 1969), p. 49.

Stereotyping

> Frequently the label of *handicapped* conjures up an image, and nonhandicapped persons often relate to this stereotypic image more readily than to the flesh and blood individuals with whom they come into contact. The stereotypes can take a number of different forms. . . .Whatever the particular image, these caricatures of human beings are substituted for the real thing.[60]

Some nonhandicapped people believe that disabled people differ from others in many respects beyond their specific disabilities.[61] Generalizing from an impairment to the whole person has been termed the "spread effect."[62] A handicap frequently short circuits the normal exchange of information and impressions of another person. It may interject false expectations and assumptions about who handicapped people are, how they should behave, and how to interpret their conduct:

> We assign a wide range of imperfections to them based on the original one and view them through the lens of the deviant characteristic rather than as a holistic collection of numerous attributes with various degrees of importance at various times and under various conditions.[63]

Noted psychologist and author, Dr. Wolf Wolfensberger has catalogued and characterized the most common stereotypes assigned to handicapped people. Noting that such perceptions derive from prejudices and bear little relation to reality, Wolfensberger has chosen phrases graphically identifying the unstated feelings behind stereotypes for handicapped people: (a) the Subhuman Organism, (b) the Menace, (c) the Unspeakable Object of Dread, (c) the Object of Pity, (d) the Holy Innocent, (e) the Diseased Organism, (f) the Object of Ridicule, and (g) the Eternal Child.[64] These stereotypes, or combinations and variations thereof, make it extremely difficult for someone to discover a handicapped person's actual personality, characteristics, needs, and abilities. Handicapped people have unusual problems with first impressions, establishing common grounds for communication, and forming relationships because they must face the additional burden of eliminating false assumptions of who and what they are.

Stigmatization

Perhaps the most significant attitude toward handicaps is that they are considered extremely negative characteristics. "What is a handicap in social terms? It is an imputation of difference from others;

[60] Robert L. Burgdorf, Jr., *The Legal Rights of Handicapped Persons* (Baltimore: Brookes Publishing Co., p. 50 (hereafter cited as *Legal Rights of Handicapped Persons);* see also, Hull, *The Rights of Physically Handicapped People,* pp. 29–30.

[61] Nettie R. Bartel and Samuel L. Guskin, "A Handicap as a Social Phenomenon," in *Psychology of Exceptional Children and Youth,* ed. William M. Cruickshank (Englewood Cliffs, N.J.: Prentice-Hall, 1971), p. 83.

[62] Beatrice A. Wright, *Physical Disability: A Psychological Approach* (New York: Harper & Row, 1960), pp. 118–19.

[63] Eisenberg, "Disability as Stigma," p. 6.

[64] Wolfensberger, *The Principle of Normalization in Human Services,* pp. 16–24.

more particularly, imputation of an *undesirable* difference."[65] To the fact that a handicapped person differs from the norm physically or mentally, people often add a value judgment that such a difference is a big and very negative one. "A handicapping condition is frequently, albeit illogically, viewed as a blameworthy characteristic or a badge of disgrace."[66]

The professional literature is full of discussions about the stigma associated with handicaps.[67] There is also evidence of a correlation between the type of disability a person has and the degree of stigma attached.[68] In a classic work on the subject of stigma, Erving Goffman describes the person with a stigma as someone thought of as not quite human. The stigmatized person is one who "possesses a trait which makes him different from normals. He possesses a stigma, an undesired differentness which separates him from the rest of society."[69] According to many sociologists and educators, the single most serious problem for handicapped people is learning to avoid, deal with, or manage the stigma that confronts them.[70]

In examining the severity of the stigma of some handicaps, observers note that by definition it focuses on a negative—the inability or absence of something.[71] The negative connotations of the concept of handicaps may, therefore, be extremely extensive:

[65] Eliot Freidson, "Disability as Social Deviance," *Sociology and Rehabilitation*, ed. Marvin B. Sussman (American Sociological Association, under grant of U.S. Dept. of Health, Education, and Welfare, 1965), p. 72.

[66] *The Legal Rights of Handicapped Persons*, p. 49. One author has gone so far as to state that being labeled as having a handicap like mental retardation is "to be burdened by a shattering stigma,. . .the ultimate horror." Robert B. Edgerton, *The Cloak of Competence* (Berkeley: Univ. of California Press, 1967), pp. 205–06. And a Federal court has noted that the stigmatization accompanying some handicaps can be likened to a "sentence of death." Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pa., 343 F. Supp. 279, 295 (E.D. Pa. 1972).

[67] "Paternalism and Public Policy," p. 44. Some authorities have suggested that the stigma associated with handicaps may be drawn from biblical references that seem to link handicaps with sin, death, demons, and punishment. Eisenberg, "Disability as Stigma," p. 5; Koestler, *The Unseen Minority*, p. 3. Other researchers suggest that negative attitudes toward handicapped people result from an "asthetic" factor reflecting the high value our society places on physique, athletic prowess, beauty, and intelligence. English, "Correlates of Stigma Toward Physically Disabled Persons," p. 218 and the studies cited therein; Bartel and Guskin, "A Handicap as a Social Phenomenon," p. 79; Jane R. Mercer, *Labeling the Mentally Retarded* (Berkeley: Univ. of California Press, 1973), pp. 6, n.29; Gliedman and Roth, *The Unexpected Minority*, p. 44; Edith Jacobson, "The 'Exceptions': An Elaboration of Freud's Character Study," app. 1 to Gliedman and Roth, *The Unexpected Minority*, p. 346; Wolfensberger, *The Principle of Normalization in Human Services*, p. 14.

[68] One study established a ranking of types of disabilities in the following order, ranging from the least to the most stigmatizing: ulcers, arthritis, asthma, diabetes, heart disease, amputation, blindness, deafness, stroke, cancer, old age, paraplegia, epilepsy, dwarfism, cerebral palsy, hunchback, tuberculosis, criminal record, mental retardation, alcoholism, mental illness. John L. Tringo, "The Hierarchy of Preference Toward Disability Groups," *Journal of Special Education*, vol. 4 (1970), pp. 295–305.

[69] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, N.J.: Prentice-Hall, 1963), p. 5.

[70] *See, e.g.*, Bartel and Guskin, "A Handicap as a Social Phenomenon," p. 94; Eisenberg, "Disability as Stigma," pp. 9–11.

[71] Gliedman and Roth, *The Unexpected Minority*, p. 23; *see also* William Roth, "Handicap as a Social Construct," *Society*, vol. 20, no. 3 (March–April 1983), pp. 56–61.

The full consequences of this stress upon social incapacity are apparent only when one recognizes that the possession of an exclusively negative social identity (i.e., always being considered incapable of normal function) is psychologically and socially synonymous with being denied any human identity whatever.

Far from being a response to an inflexible fact about biology, our perception of a handicap nearly always reflects an arbitrary, unconscious decision to treat normal social function and the possession of any handicap as mutually exclusive attributes.[72]

Extent of Handicap Discrimination

Despite some improvements, the treatment of handicapped individuals remains discriminatory in many critical areas.

Education

Education is the crucible of social and economic opportunity in America.[73] Public education systems, however, have consistently underserved and undereducated handicapped persons. In 1975 the United States Congress made the following findings:

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected.[74]

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[72] Gliedman and Roth, *The Unexpected Minority*, pp. 24, 30.

[73] In the oft-quoted language of the Supreme Court in Brown v. Board of Educ., 347 U.S. 483, 493 (1954):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

[74] 20 U.S.C. §1400(b) (Supp. IV 1980).

Congress addressed these serious problems through the Education for All Handicapped Children Act,[75] which provides Federal grant funding to the States with the goal of assuring "all handicapped children the right to a free appropriate public education."[76] Almost a decade after the enactment of this law, a great many handicapped children continue to be excluded from the public schools, and others are placed in inappropriate programs.[77]

Overall, handicapped people have received much less education than their nonhandicapped peers. Some 34 percent of severely disabled adults have had 8 years or less of education and 57 percent have not completed high school. For the nondisabled population, those figures are 9 percent and 23 percent, respectively.[78] Although these figures are only gross data that do not indicate what percentage of the disabled population have conditions such as mental retardation that might affect skills involved in higher educational levels, they nonetheless are evidence of a substantial disparity. The higher one goes on the education scale, the lower the proportion of handicapped people one finds.[79]

The ways in which handicapped children have been denied equal educational opportunity are legion.[80] Many have languished for months or years on waiting lists for placement in educational programs. Public education agencies have engaged in administrative buck-passing as each ascribes to other agencies the duty of providing a particular child with an educational program. As a result, some children do not have access to a program from any agency. School districts have lagged far behind targeted dates for delivery of educational services to handicapped children; many have used funding problems as an excuse for delaying or refusing to provide programs.

In addition, numerous children have handicapping conditions that significantly impair their educational progress, but because these conditions have not been

[75] Pub. L. No. 94-142, 20 U.S.C. §§1400-1461) (1976 and Supp. IV 1980); chap. 3 under the section entitled "Education for All Handicapped Children Act."

[76] 20 U.S.C. §1412(1) (1976 and Supp. IV 1980).

[77] A September 1982 survey commissioned by the Department of Education reports that 22,610 children identified as handicapped are receiving no education whatever. Another 31,976 are in some school program but are not receiving special education services that they have been identified as needing. Some 192,499 are awaiting evaluations. DBS Corporation, "1980 Elementary and Secondary Schools Civil Rights Survey: National Summaries," table 1 (under contract for U.S. Dept. of Education) (September 1982). These figures do not account for children school authorities have not yet identified as handicapped. Moreover, the numbers quoted are probably significantly underestimated; they are projected estimates based upon *self-reported* numbers supplied by school districts.

[78] U.S., Department of Health and Human Services, Social Security Administration, *Work Disabled in the United States, A Chartbook* (1980) chart 7 (hereafter cited as *Chartbook).*

[79] According to one survey, people with some type of work disability are 38.5 percent of the portion of the population having less than 8 years of education, but only 8.7 percent of the group having 12 or more years of education. Rehab. Group, Inc., *Digest of Data on Persons with Disabilities* (under contract to Congressional Research Service) (Washington, D.C.: Government Printing Office, 1979), table 5, p. 17 (hereafter cited as *Digest).*

[80] *See, e.g.,* Dennis E. Haggerty and Edward S. Sacks, "Education of the Handicapped: Towards a Definition of an Appropriate Education," *Temp. L.Q.,* vol. 50 (1977), pp. 961-62; "History of Unequal Treatment," pp. 879-83.

identified, they continue to receive inappropriate programs. Instances of misclassification are widespread, particularly regarding members of ethnic and racial minorities. Architectural barriers in school buildings have sometimes prevented appropriate educational placements. Schools have denied handicapped children recreational, athletic, and extracurricular activities provided for nonhandicapped students. The goal of "mainstreaming" handicapped pupils has sometimes been misused as an excuse to dump them into the regular classroom environment without adequate support services and personnel. As could be expected, this disadvantages both teachers and pupils. On the other hand, some school systems have unnecessarily isolated and segregated handicapped children, often in separate schools and facilities.

Employment

Statistical studies have shown that unemployment rates among handicapped people are drastically higher than rates of unemployment for nonhandicapped people.[81] Only a small percentage of the handicapped Americans who could work if given the opportunity are actually employed.[82] Unemployment rates among handicapped workers are currently estimated to be between 50 to 75 percent, up from a pre-recession rate of 45 percent.[83] Furthermore, studies indicate that only in a tiny percentage of cases is inability to perform a regular, full-time job the reason a handicapped person is not employed.[84]

Frequently, employer prejudices exclude handicapped persons from jobs. Biases operate subtly, sometimes unconsciously, to eliminate handicapped job applicants in the application, screening, testing, interviewing, and medical examination processes:

> Often, the employer makes erroneous assumptions regarding the effect of a person's disability on his or her ability to perform on the job. In most cases the disabled person is never given an opportunity to disprove those assumptions; in some cases, the disabled person never knows why he or she didn't get the job.[85]

Only an estimated one-third of the blind people and fewer than half of the paraplegic people (those whose lower bodies are paralyzed or nonfunctional on both sides) of working age in this country

[81] *Chartbook*, chart 14; Barbara L. Wolfe, "How the Disabled Fare in the Labor Market," *Monthly Labor Review*, vol. 103, no. 9 (1980), pp. 50–51; J. Merrill Shanks and Howard E. Freeman, *Executive Summary for the California Disability Survey* (prepared for the Calif. Department of Rehabilitation) (Winter 1980), table ES 9.

[82] 118 Cong. Rec. 3320–21 (1972) (statement of Sen. Williams); "History of Unequal Treatment," p. 864; Note, "Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled," *Geo. L. J.* vol. 61 (1973), p. 1512 (hereafter cited as "Abroad in the Land").

[83] President's Committee on Employment of the Handicapped figures *quoted in Handicapped Rights and Regulations*, vol. 4, no. 7 (Apr. 5, 1983), p. 49.

[84] *See, e.g.*, Berkeley Planning Associates, *Final Report: Analysis of Policies of Private Employers Toward the Disabled* (prepared under a Dept. of Health and Human Services contract) (November 1981), p. 413 (hereafter cited as *Analysis of Policies of Private Employers*).

[85] Deborah Kaplan, "Employment Rights: History, Trends and Status," in *Law Reform in Disability Rights*, vol. 2 (Berkeley: Disability Rights Education and Defense Fund, 1981), p. E–4.

have jobs. Between 15 and 25 percent of working-age persons with epilepsy and only a handful of those with cerebral palsy have been able to secure employment.[86]

The majority of unemployed handicapped people, if given the chance, are quite capable of taking their places in the job market.[87] Numerous studies indicate that handicapped workers, when assigned appropriate positions, perform as well as or better than their nonhandicapped fellow workers.[88] A U.S. Civil Service Commission study of appointments of severely handicapped workers to Federal agency jobs over a 10-year period concluded that "the work record is excellent."[89]

E.I. du Pont de Nemours and Company is an example of a private employer that has made a point of recruiting handicapped employees and has monitored their numbers and progress in the company. Du Pont has achieved a reputation as an exemplary employer of handicapped people. The company's reports are replete with examples of successful case stories: a man whose leg was amputated as a result of a military injury who serves as a maintenance mechanic; mentally retarded messengers who have years of perfect attendance, excellent performance records, and who help to train new messengers; the blind computer programmer whose clear and orderly programs have earned him a recent promotion; a woman with multiple birth defects and an artificial leg who is an excellent stenographer; a deaf and speechless man who operates and trains others to use Du Pont's computer-assisted machining center; a polio victim who walks with a leg brace who serves as a computer office assistant; a blind man who is a highly skilled pump mechanic.[90] The company has also documented the accommodations it has made to allow its handicapped employees to perform successfully and has concluded, "The cost of most accommodations is nominal."[91] Other major companies, including the Xerox Corporation, AT&T, the Prudential Insurance Company, Sears, Roebuck and Company, Levi Strauss and Company, IBM, and Control Data Corporation, have made similar efforts to promote the employment of handicapped workers.[92]

[86] 118 Cong. Rec. 3321. A study of severely handicapped people in the Richmond area indicated that while 56 percent of those responding were under age 45, 68 percent had high school or college degrees, and 85 percent wanted to work, only 9 percent were earning wages. *Handicapped Rights and Regulations,* vol. 3, no. 20 (Oct. 5, 1982), p. 158.

[87] 118 Cong. Rec. 3320. It is estimated that 9 out of 10 mentally retarded persons could work if given proper training and opportunities. Gittler, "Fair Employment and the Handicapped," p. 954, n. 3; "History of Unequal Treatment," p. 864. The 15–25 percent rate of employment of persons with epilepsy occurs despite the fact that nearly 80 percent of such individuals have their seizures under control. Gittler, "Fair Employment and the Handicapped," p. 954, n. 3.

[88] *See* U.S., Department of Labor, Bureau of Labor Standards, *Workmen's Compensation and the Physically Handicapped Worker,* (Bulletin no. 234, 1961), app. 5, 20.

[89] U.S., Civil Service Commission, *A Chain of Cooperation: Severely Physically Disabled Employees in the Federal Service* (1976), p. 3.

[90] E.I. du Pont de Nemours and Co., *Equal to the Task: 1981 Du Pont Survey of Employment of the Handicapped,* pp. 10–16 (hereafter cited as *Equal to the Task).*

[91] Ibid., pp. 17–18.

[92] *See, e.g.,* Bob Gatty, "Business Finds Profit in Hiring the Disabled," *Nation's Business* (Washington, D.C.: Chamber of Commerce of the United States, 1981), pp. 30–35.

In spite of these positive initiatives, however, there remains a long way to go. In 1981 Du Pont, for example reported that 2.4 percent of its employees were handicapped, an 89 percent increase from 1973.[93] Thus, even in this well-regarded program, handicapped people are represented in much smaller proportions than their estimated 9 to 13 percent share of the population as a whole.

The Federal Government seeks to be "an equal opportunity employer" of handicapped persons.[94] A 1979 study of Federal employees found that 7.4 percent were handicapped. Of the new employees hired in calendar year 1979, 3.4 percent were handicapped; 5.2 percent of promotions were to handicapped persons.[95] These figures are based on a broad interpretation of the meaning of handicaps. In contrast, the U.S. Equal Employment Opportunity Commission has identified certain severe handicaps as "targeted disabilities" for Federal agency recruitment and hiring programs.[96] The EEOC suggests that a conservative figure of 6 percent be sought as the proportion of employees with the targeted disabilities in the Federal work force.[97] As of December 31, 1980, persons with targeted disabilities were only 0.85 percent of the total Federal work force.[98]

Those handicapped workers who are able to find a job are more than twice as likely as nonhandicapped persons to work part time,[99] in spite of the fact that most handicapped individuals are able to work a full, standard, 8-hour workday and a normal 5-day workweek.[100] Handicapped employees also tend to be underpaid. Studies have demonstrated that, for every educational level, the average wage rate of disabled people is below that of the nondisabled population. For handicapped people with 12 years of education or less, the average wage rate is below minimum wage.[101] Even among those who have attended college, the differences are large.[102] Among full-time, full-year workers, handicapped

[93] *Equal to the Task*, p. 5.

[94] *See* 124 Cong. Rec. 30347 (1978) (statement of Sen. Cranston); S. Rep. No. 95-890, 95th Cong., 2d Sess. 18-19 (1978); Shirey v. Devine, 670 F.2d 1188, 1195, n. 21, 1199 (D.C. Cir. 1982).

[95] U.S., Office of Personnel Management, *Statistical Profile of the Handicapped Federal Civilian Employees* (August 1981), pp. 6, 16. Employees who did not identify their handicap status were not included in the study.

[96] U.S., Equal Employment Opportunity Commission, Management Directive 711, Nov. 2, 1982, p. 3. The targeted disabilities are: deafness, blindness, missing extremities, partial and complete paralysis, convulsive disorders, mental retardation, mental illness, and distortion of limbs or spine.

[97] Ibid., p. A-1.

[98] Ibid., p. A-2.

[99] Wolfe, "How the Disabled Fare in the Labor Market," p. 50.

[100] *See, e.g.*, Berkeley Planning Associates, *Final Report: Analysis of Policies of Private Employers Toward the Disabled* (prepared under a Dept. of Health and Human Services contract) (November 1981), p. 413 (hereafter cited as *Analysis of Policies of Private Employers).*

[101] Wolfe, "How the Disabled Fare in the Labor Market," p. 50.

[102] Among men who are full-time, full-year workers, disabled workers earn, in general, less than 90 percent of what the nondisabled earn. The biggest difference is among the lowest educational group, where disabled workers earn less than 80 percent of what the nondisabled earn. Similarly, among women who work full time, year round, the largest difference is also among the lowest educational group, where disabled persons earn approximately half of what the nondisabled earn. In other educational groups, disabled women also do more poorly (relative to men) compared to their nondisabled peers, earning between 62 percent and 79 percent of what the nondisabled earn. Ibid., p. 51.

persons earn less than their nonhandicapped counterparts within each sex, educational, and racial grouping.[103]

Such differences in wage levels cannot be explained by any differential in productivity. Studies dating back to a massive 1948 Department of Labor study of disabled and nondisabled workers have consistently concluded that handicapped and nonhandicapped workers are equally productive.[104] A recent survey of such research studies concluded: "the existing literature appears to show both that the disabled who are working are as productive in their jobs as their co-workers and that employers perceive the handicapped as being comparably productive."[105]

Some authorities have noted that handicapped people are subject to "job stereotyping," whereby employers or vocational guidance counselors channel everyone with particular disabilities into particular types of jobs.[106] In some instances, this means that handicapped persons are considered more suited for unskilled, low-paying positions involving monotonous tasks.[107]

The inequality of employment opportunities results in general economic disparity for handicapped people. In 1977 the median family income of nondisabled individuals was nearly double that of the severely disabled population. Similarly, fewer than 30 percent of severely disabled persons reported family incomes of $15,000 or more, while the figure was nearly 60 percent for nondisabled people. Almost 30 percent of severely disabled people had incomes of less than $5,000, compared with 11 percent of the nondisabled population.[108] According to one study, 28.7 percent of those in poverty and only 11.8 percent of those above the poverty level had a work disability.[109] Another study found that between 20 and 30 percent of those reporting physical impairments fell below the $5,000 income range.[110] As noted previously, studies have consistently indicated that impaired ability of handicapped people accounts, at most, for a small proportion of the lower incomes they experience.[111]

Institutionalization

Popular and professional literature contains abundant discussion of problems with large-scale residential institutions for handicapped people.[112] The

[103] Ibid.

[104] *See* studies cited in *Analysis of Policies of Private Employers*, pp. 415–16.

[105] Ibid., p. 434.

[106] Kaplan, "Employment Rights: History, Trends and Status," p. E–9; Brian J. Linn, "Uncle Sam Doesn't Want You: Entering the Federal Stronghold of Employment Discrimination Against Handicapped Individuals," *De Paul L. Rev.*, vol. 27 (1978), p. 1051, n. 20.

[107] "History of Unequal Treatment," p. 865.

[108] *Chartbook*, chart 15.

[109] *Digest*, table 5, p. 18.

[110] *Digest*, chart 4, p. 11.

[111] "Analysis of Policies of Private Employers," p. 421.

[112] *See, e.g.*, Erving Goffman, *Asylums* (Chicago: Aldine Publishing Co., 1961); David Ferleger, "Loosing the Chains: In-Hospital Civil Liberties of Mental Patients," *Santa Clara Lawyer*, vol. 13 (1973), pp. 447–500; Burton Blatt and Fred Kaplan, *Christmas in Purgatory: A Photographic Essay on Mental Retardation* (Boston: Burton Blatt, 1966); Wolfensberger, "The Origin and Nature of Our Institutional Models"; Ken Kesey, *One Flew Over the Cuckoo's Nest* (New York: Signet, 1962); Geraldo Rivera, *Willowbrook: A Report on How It is and Why It Doesn't Have to Be That Way* (New York: Vintage Books, 1972); Stanley Herr, "Civil Rights, Uncivil Asylums and the Retarded," *U. Cin. L. Rev.*, vol. 43, no. 4 (1974), p. 679; Burton Blatt, *Exodus from Pandemonium* (Boston: Allyn & Bacon, 1970); Kenneth Donaldson, *Insanity Inside Out* (New York:

harshest side of institutionalization is the systematic placement of handicapped people in substandard residential facilities, where incidents of abuse by staff and other residents, dangerous physical conditions, gross understaffing, overuse of medication to control residents, medical experimentation, inadequate and unsanitary food, sexual abuses, use of solitary confinement and physical restraints, and other serious deficiencies and questionable practices have been reported.[113]

Such conditions are not, of course, characteristic of all residential facilities. Many institutions for handicapped people are humane and well run, although they often lack adequate programing for residents.[114] But even the better institutions suffer the ill effects of segregation:

> Institutions serve two central purposes. First, they segregate disabled people from the community; and second, they provide convenience for administrators and instructional personnel because children with a given disability are concentrated together and readily accessible.
>
> As instruments of segregation, institutions are undeniably effective. Typically located in rural areas, they become small worlds unto themselves.
>
> As vehicles of administrative convenience, they are equally successful.
>
> Within the institution operational efficiency is achieved through time-honored mass production techniques, permitting the employment of highly specialized staff, homogeneous grouping of the children, and centralized support services.
>
> As settings for individual growth and development, however, institutions may be the worst possible arrangement.[115]

Institutionalization almost by definition entails segregation and isolation: "Not only is segregation of the sexes prevalent, but segregation from families, normal society and peer groups is also a product of institutionalization."[116] Indeed, a desire to segregate handicapped people from the rest of society prompted the development of residential institu-

Crown, 1976); D.L. Rosenhan, "On Being Sane in Insane Places," *Science*, vol. 179 (1973), pp. 250–58; and Anne Barry, *Bellevue Is a State of Mind* (New York: Harcourt Brace Jovanovich, Inc., 1971).

[113] *See, e.g.*, Herr, "Civil Rights, Uncivil Asylums and the Retarded," pp. 685–90; "History of Unequal Treatment," pp. 889–91; Parham v. J.R., 442 U.S. 584, 626–27 (1979) (Brennan, J., concurring in part and dissenting in part). *See also* Wyatt v. Stickney, 344 F. Supp. 387, 391 (M.D. Ala. 1972) (quoting unreported interim emergency order, Mar. 2, 1972); Clark, "The New Snake Pits," *Newsweek*, May 15, 1978, p. 93; In re D., 70 Misc. 2d 953, 335 N.Y.S. 2d 638, 649 (1972).

[114] *See, e.g.*, Daryl Paul Evans, *The Lives of Mentally Retarded People* (Boulder, Colo.: Westview Press, 1983), p. 223; S. Rep. No. 94-160, 94th Cong. 1st Sess. (1975); 121 Cong. Rec. 29820–21 (1975) (statement of Sen. Javits); 121 Cong. Rec. 16518 (1975) (statement of Sen. Javits); 121 Cong. Rec. 16516 (1975) (statement of Sen. Randolph).

[115] Bowe, *Handicapping America*, pp. 143–44.

[116] "History of Unequal Treatment," p. 890; *see also* Parham v. J.R., 442 U.S. 584, 626 (1978) (Brennan, J., concurring in part and dissenting in part).

tions.[117] This segregationist purpose still operates, one authority on institutions for mentally retarded people has contended:

> The complementary goals of isolation and segregation are still pursued today. Old institutions are still being enlarged; and despite the fact that normalizing community services have been shown to be less expensive than institutional services, new institutions are still being built for upwards of 1,000 residents at a capital cost per resident, for example of $24,000 in Illinois, $30,000 in Missouri, $35,000 in New York, and even more. This continued expansion of uneconomic institutional services can only be interpreted as an expression of the desire on the part of society and those responsible for the delivery of services to continue to segregate and dehumanize mentally retarded individuals. Institutions are still omnibus in purpose, and lack rational admitting criteria, intellectualized lipservice notwithstanding. Institutions are still placed in inappropriate isolated locations, and even the most expensive ones are still dehumanizing.[118]

There has been increasing acceptance in recent years of the fact that most training, treatment, and habilitation services can be better provided to handicapped people in small, community-based facilities rather than in large, isolated institutions.[119] Professionals, courts, Congress, and more than one President have called for "deinstitutionalization" and the development of appropriate community programs.[120] Because of such official reorientation toward community alternatives and a variety of other factors (such as the emergence of new service philosophies among human service professionals and the development of drug therapies and other novel treatment approaches), the number of handicapped persons in residential facili-

[117] Wolfensberger, "The Origin and Nature of Our Institutional Models," pp. 94–126; "History of Unequal Treatment," p. 889; Herr, "Civil Rights, Uncivil Asylums and the Retarded," p. 682, n. 17.

[118] Affidavit of W. Wolfensberger, Maryland Ass'n for Retarded Children v. Maryland, Civil No. 72-733-M (Md. Cir. Ct. Baltimore Cty., filed Apr. 9, 1974), p. 8, quoted in Herr, "Civil Rights, Uncivil Asylums and the Retarded," p. 699.

[119] Halderman v. Pennhurst State School and Hosp., 446 F. Supp. 1295, 1311 (E.D. Pa. 1977), *reversed on other grounds*, 451 U.S. 1 (1981); Bruce G. Mason, Frank J. Menolascino, and Lorin Galvin, "The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface," *Creighton L. Rev.* vol. 10 (1976), pp. 124–27; Herr, "Civil Rights, Uncivil Asylums and the Retarded," p. 687; Lloyd M. Dunn, "Small Special-Purpose Residential Facilities for the Retarded," in *Changing Patterns in Residential Services for the Mentally Retarded*, ed. Robert B. Kugel and Wolf Wolfensberger (Washington, D.C.: President's Committee on Mental Retardation, 1969), pp. 213–20.

[120] Dunn, "Small Special-Purpose Residential Facilities for the Retarded," pp. 213–20; President's Message, 88th Cong., 1st Sess., *reprinted in* 1963 U.S. Code Cong. & Ad. News 1466, 1474; H.R. Rep. No. 88-694, 88th Cong., 1st Sess., *reprinted in* 1963 U.S. Code Cong. & Ad. News 1054, 1062; S. Rep. No. 90-725, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. Code Cong. & Ad. News 2061, 2062; S. Rep. No. 94-160, 94th Cong., 1st Sess. 26–34 (1975); 121 Cong. Rec. 16516–20 (1975) (statement of Sen. Randolph); 121 Cong. Rec. 29819–21 (1975) (statement of Sens. Stafford and Javits); H.R. Rep. No. 94-58, 94th Cong., 1st Sess. *reprinted in* 1975 U.S. Code Cong. & Ad. News 919, 925; U.S., General Accounting Office, *Returning the Mentally Disabled to the Community: Government Needs to Do More* (1977), pp. 3–4 (hereafter cited as *GAO Report*).

ties has dwindled in the past two decades.[121]

Despite such initiatives, a great many handicapped persons remain in segregative facilities. The Comptroller General has estimated that about 215,500 persons were residing in public mental hospitals in 1974 and that some 181,000 persons were in public institutions for mentally retarded people as of 1971.[122] In 1976 one study estimated that 1,550,120 persons were in long term residential care facilities.[123]

The process of deinstitutionalization, moreover, has not been problem free. All too often, it has been distorted to justify turning residents out of an institution without arrangements for appropriate housing or programs in the community. Patients summarily banished from institutions and left to fend for themselves often wind up as victims of crime or as residents of substandard nursing homes and rundown hotels.[124]

Medical Treatment

Handicapped people also face discrimination in the availability and delivery of medical services. While occasional denials of routine medical care have been reported,[125] a much more serious problem involves the apparent withholding of lifesaving medical treatment from individuals, frequently infants, solely because they are handicapped.[126]

Recently, widely publicized denials of medical treatment to handicapped infants have occurred in Indiana,[127] Illinois,[128] and California.[129] In response to these incidents, President Reagan directed the Attorney General and the Secretary of Health and Human Services to notify all hospitals receiving Federal financial assistance that failure to pro-

[121] *GAO Report*, p. 8.

[122] Ibid., pp. 8–9.

[123] These included: facilities for the mentally retarded (189,210); children's facilities (43,790); psychiatric institutions (65,400); nursing homes (1,182,670); facilities for the physically handicapped (37,780); and other facilities (31,270). U.S., Department of Commerce, Bureau of the Census, *Survey of Institutionalized Persons*, 1976, as reported in *Digest*, p. 108. "Long-term care facilities" are those in which residents' average stay is 30 days or more. Due to survey data limitations, these figures do not include residents of large, publicly owned psychiatric hospitals containing some 240,000 to 270,000 beds. *Digest*, p. 126. Additionally, the inclusion of nursing home residents in these figures is problematic; nursing homes range from small, well-run facilities that are highly integrated into the surrounding community to larger agencies that, as the Comptroller General has noted, are equivalent to large-scale residential institutions. *GAO Report*, p. 10. Moreover, nursing homes frequently house residents who are not handicapped. Nonetheless, nursing homes do represent the largest single type of facility providing care for mentally ill persons. Ibid., p. 11.

[124] *See, e.g., GAO Report*, pp. 8, 13–16; Clark, "The New Snake Pits," pp. 93–94.

[125] *See, e.g.*, Lyons v. Grether, 239 S.E.2d 103 (Va. 1977) (physician refused to treat a blind woman with a guide dog). *See generally Legal Rights of Handicapped Persons*, pp. 753–856.

[126] *See, e.g.*, Raymond S. Duff and A.G.M. Campbell, "Moral and Ethical Dilemmas in the Special-Care Nursery," *New England Journal of Medicine*, vol. 289, no. 17 (1973), p. 890; Anthony Shaw, "Doctor, Do We Have A Choice?" *New York Times Magazine*, Jan. 30, 1972, p. 44; 128 Cong. Rec. S6142–55 (daily ed. May 26, 1982) (statement of Sens. Denton and Hatch). Denials of lifesaving medical treatment to severely handicapped newborns in the United States have been estimated to be several thousand each year. *New York Times*, June 12, 1974, p. 18; "History of Unequal Treatment," p. 867.

[127] George Will, "The Killing Will Not Stop," *Washington Post*, Apr. 22, 1982, p. A29.

[128] *Washington Times*, May 17, 1982, p. 1.

[129] Guardianship of Phillip B., 188 Cal. Rptr. 781 (App. 1983).

vide medical services because a person is handicapped constitutes discrimination prohibited by Federal law.[130] Attempts to secure medical treatment for handicapped children have resulted in a number of court cases.[131]

Another problem involves the imposition of drastic medical procedures upon handicapped people without their consent. Nonconsensual electroconvulsive therapy (electroshock),[132] psychosurgery,[133] and the administration of psychotropic drugs[134] have generated particular controversy and litigation. In addition, handicapped persons have sometimes been used as human research subjects for medical experimentation[135] and as an easily exploited source of organ transplants.[136]

Sterilization

Under State statutes and, many times, even in the absence of statutory authorization, mentally and physically handicapped people have been sterilized without their consent.[137] In the late 1950s, 28 States had sterilization statutes; 17 included persons with epilepsy, along with mentally ill and mentally retarded indi-

[130] White House Memorandum, Apr. 30, 1982 *reprinted in* 128 Cong. Rec. S6154-55 (daily ed. May 26, 1982). Interim final regulations implementing the President's directive have been published, 48 Fed. Reg. 9630 (Mar. 7, 1983), but declared invalid because of failure to observe rulemaking standards of the Administrative Procedure Act. American Academy of Pediatrics v. Heckler, C.A. No. 83-0774 (D.D.C., Apr. 14, 1983).

[131] *E.g.,* Application of Cicero, 101 Misc. 2d 699, 421 N.Y.S. 2d 965 (1979); Guardianship of Phillip B., 188 Cal. Rptr. 781 (App. 1983); Maine Medical Center v. Houle, Civ. Action Docket No. 74-145 (Super. Ct. Cumberland, Me., Feb. 14, 1974). *See also* In re Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978). For a decision setting out comprehensive standards and procedures for making decisions concerning lifesaving or life-prolonging medical treatment for mentally incompetent adults, see Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

[132] *See, e.g.,* New York City Health and Hosp. Corp. v. Stein, 70 Misc. 2d 944, 335 N.Y.S. 2d 461 (1972); Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976). *See* Note, "Regulation of Electroconvulsive Therapy," *Mich. L. Rev.,* vol. 75 (1976), pp. 363-412; Erin Moore, "Legislative Control of Shock Treatment," *U.S.F.L. Rev.,* vol. 9 (1975), pp. 738-80.

[133] *See, e.g.,* Aden v. Younger, 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976). *See also* "Symposium on Psychosurgery," *B.U.L. Rev.,* vol. 54 (1974), pp. 215-353; J. Douglas Peters and Jerry Lee, "Psychosurgery: A Case for Regulation," *Det. C.L. Rev.,* 1978, pp. 383-411; Ann L. Plamondon, "Psychosurgery: The Rights of Patients," *Loy. L. Rev.,* vol. 23 (1977), pp. 1007-28.

[134] *See, e.g.,* Mills v. Rogers, 102 S.Ct. 2442 (1982); Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981); In re Guardianship of Roe, III, 421 N.E.2d 40 (Mass. 1981); Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973). *See also* Robert Plotkin, "Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment," *Nw. U.L. Rev.,* vol. 72 (1977), pp. 474-79.

[135] *See, e.g.,* Kaimowitz v. Michigan Dep't of Mental Health, No. 73-19434-AW (Mich. Circ. Ct. of Wayne Cty., July 10, 1973), summarized in 42 U.S.L.W. 2063 (July 31, 1973), and reproduced in *Legal Rights of Handicapped Persons,* pp. 808-24. *See also* Basic HHS Policy for Protection of Human Research Subjects, 45 C.F.R. §§46.01-46.306 (1982).

[136] *E.g.,* Little v. Little, 576 S.W.2d 493 (Civ. App. Tex. 1979); Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969); Lausier v. Pescinski, 67 Wis.2d 4, 226 N.W.2d 180 (1975); In re Richardson, 284 So.2d 185 (La. App. 1973), *cert. denied,* 284 So.2d 338 (La. 1973). *See* John A. Robertson, "Organ Donations by Incompetents and the Substituted Judgment Doctrine," *Colum. L. Rev.,* vol. 76 (1976), pp. 48-78.

[137] "History of Unequal Treatment," p. 861; Irwin N. Perr, "Epilepsy and the Law," *Clev.-Mar. L. Rev.,* vol. 7 (1958), p. 289; "Wicked Witch: Sterilization of Handicapped Persons," pp. 1020-34.

viduals, as targets for compulsory sterilization.[138] In 1927, at the height of a subsequently repudiated eugenics movement, even the United States Supreme Court approved the practice of involuntary sterilization.[139] Justice Holmes, in *Buck v. Bell*, declared:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . .Three generations of imbeciles are enough.[140]

Although sterilization of handicapped persons has been the subject of much debate and litigation,[141] the 1927 case is now generally considered of doubtful validity as a legal precedent.[142] Nonetheless, both compulsory sterilization statutes and the practice of performing involuntary sterilizations, although steadily dwindling,[143] continue. Currently 15 States have statutes authorizing compulsory sterilization of mentally ill or mentally retarded individuals, and at least 4 authorize the sterilization of persons with epilepsy.[144] And although exact statistics are not available, commentators are in general agreement that involuntary sterilizations of handicapped persons, both pursuant to State statutes and in the absence of statutory authorization, continue to be performed.[145] Lawsuits dealing with sterilizations of handicapped persons command a good deal of judicial attention.[146] The only U.S. Supreme Court case since *Buck v. Bell* to deal with sterilization of a handicapped person involved a document signed by an Indiana judge ordering the sterilization of a 15-year-old, "somewhat retarded" girl, even though Indiana had no statute authorizing such a procedure. The girl was told that she was having her appendix removed. Only much later, after she had married and could not conceive, did she learn that she had been sterilized.[147]

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[138] "History of Unequal Treatment," p. 861; Perr, "Epilepsy and the Law," p. 290.

[139] Buck v. Bell, 274 U.S. 200 (1927).

[140] *Id.* at 207.

[141] *See, e.g.,* cases discussed in "Wicked Witch: Sterilization of Handicapped Persons," pp. 1013–33, and in *Legal Rights of Handicapped Persons,* pp. 857–918; *see also* Parham v. J.R., 442 U.S. 584, 630–31, n. 18 (1978) (Brennan, J., concurring in part and dissenting in part).

[142] *See, e.g.,* Charles W. Murdock, "Sterilization of the Retarded: A Problem or a Solution?" *Cal. L. Rev.,* vol. 62 (1974), pp. 921–22; "Wicked Witch: Sterilization of Handicapped Persons," pp. 1006–13; North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451, 454 (M.D. N.C. 1976).

[143] "Wicked Witch: Sterilization of Handicapped Persons," pp. 1022–23; Elyce Zenoff Ferster, "Eliminating the Unfit—Is Sterilization the Answer?" *Ohio St. L.J.,* vol. 27 (1966), pp. 613, 619; North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451, 454 (M.D. N.C. 1976).

[144] A list of these statutes is set out in "Developments in the Law—The Constitution and the Family," *Harv. L. Rev.,* vol. 93 (1980), p. 1297, nn. 12 and 13 (hereafter cited as "Constitution and the Family").

[145] "Constitution and the Family," p. 1298.

[146] *E.g.,* In re C.D.M., 627 P.2d 607 (Alas. 1981); In re Guardianship of Hayes, 93 Wash. 228, 608 P.2d 635 (1980); In re Grady, 85 N.J. 235, 426 A.2d 467 (1981); In re Penny N., 120 N.H. 269, 414 A.2d 541 (1980); In re A.W., 637 P.2d 366 (Colo. 1981); In re Guardianship of Eberhardy, 102 Wis. 2d 539, 307 N.W. 2d 881 (1981); In re Mary Moe, 385 Mass. App. 555, 432 N.E. 2d 712 (1982); Wentzel v. Montgomery General Hosp., 293 Md. 685, 447 A.2d 1244 (1982); *see also* Parham v. J. R., 442 U.S. 584, 630–31, n. 18 (1979) (Brennan J., concurring in part and dissenting in part).

[147] Stump v. Sparkman, 435 U.S. 349, 351, 353 (1978). Under the doctrine of judicial immunity,

Architectural Barriers

Buildings, thoroughfares, and open areas have generally been designed for an ideal user with average physical proficiency. As such, they are inaccessible to many individuals with certain kinds of handicaps.[148] The barriers take a variety of forms: stairs, escalators, narrow doorways, revolving doors, inaccessible restroom facilities, narrow aisles, drinking fountains and light switches that are too high, fire alarm boxes that cannot be reached, lack of raised letter and braille signs, overly sloped or excessively long ramps, telephone booths and elevator controls that are difficult to reach, carpeting and floor surfaces that are slippery or too spongy, sidewalks without curb cuts, lack of handrails and grab bars, and others.

It has been more than 20 years since the American National Standards Institute (ANSI)[149] published architectural accessibility standards, which addressed such matters as parking lots, ramps, doors and doorways, restroom facilities, and warning signals.[150] Among other things, the ANSI standards require: (1) at least one ground-level entrance to a building; (2) ramps in at least one location; (3) doorways 32 inches wide or wider; (4) restrooms that can accommodate wheelchairs; (5) access to elevators; and (6) safe parking for handicapped persons.[151] Many State laws and building codes,[152] as well as the General Services Administration, Department of Housing and Urban Development, Department of Defense, and other Federal agencies,[153] adopted the ANSI standards. Recently, the Federal Architectural and Transportation Barriers Compliance Board published comprehensive "Minimum Guidelines and Requirements for Accessible Design," which were largely based on the ANSI standards.[154] Despite the adoption of such standards and the fact that nearly every State has a statute prohibiting architectural barriers, such barriers continue to be a serious problem.[155] The extent of inaccesibility was illustrated by a 1980 study of State-

the United States Supreme Court held that she had no legal recourse against the judge who approved the involuntary sterilization that had been performed upon her. *Id.* at 362-64.

[148] Don F. Nicolai and William J. Ricci, "Access to Buildings and Equal Employment Opportunity For the Disabled: Survey of State Statutes," *Temp. L.Q.*, vol. 50 (1977), pp. 1067-68 (hereafter cited as "Survey of State Statutes").

[149] ANSI is a private institution located in New York City, not connected with the Federal Government, that provides a mechanism for creating voluntary consensus standards. 97 Fed. Reg. 33863 (1982).

[150] American National Standards Institute, *American Standard Specifications for Making Buildings and Facilities Accessible to and Usable By the Physically Handicapped* A 117.1-1961, *reprinted in revised form in* 36 C.F.R. 1190.

[151] Ibid. Bowe, *Handicapping America*, pp. 77-78.

[152] "Survey of State Statutes," pp. 1074-76.

[153] Hull, *The Rights of Physically Handicapped People*, pp. 71-73. New ANSI standards were published in 1980, but were not adopted by the Federal standard-setting agencies. Ronald L. Mace, statement, *Consultation*, pp. 282-83.

[154] 36 C.F.R. 1190, 47 Fed. Reg. 33862-93 (Aug. 4, 1982). These have been touted as the minimum, bottom-line, accessibility standard. Charles D. Goldman, statement, *Consultation*, p. 336.

[155] "Survey of State Statutes," p. 1069; Barbara P. Ianacone, "Historical Overview: From Charity to Rights," *Temp. L.Q.*, vol. 50 (1977), p. 958, n. 33; Bowe, *Handicapping America*, p. 78. It has been noted: "Disabled people have hailed these laws affecting new buildings with something resembling a fanfare of trumpets. Designers, by and large, have responded to them with hostility." Raymond Lifchez and Cheryl Davis, "What Every Architect Should Know," in *Disabled People as Second-Class Citizens*, ed. Myron G. Eisenberg, Cynthia Griggins, and Richard J. Duval (New York: Springer Publishing Co., 1982) p. 90.

owned buildings housing services and programs available to the general public. The study found 76 percent of the buildings physically inaccessible and unusable for serving handicapped persons, even when taking into account the option of moving programs and services to other parts of the buildings or otherwise restructuring them.[156]

Transportation

Our otherwise mobile society frequently denies handicapped people access to the various means of transportation. The Congressional Budget Office has described the extent of the problem with regard to public transportation:

> More than 1 million physically disabled, blind or deaf persons who live within a short walk of transit service cannot physically use it. . . .An additional 4 million handicapped persons live near transit but find it difficult to use.[157]

Architectural impediments and physical obstacles, both on the vehicles themselves and at terminals, frequently render use of transportation systems impossible for various groups of handicapped citizens.[158]

In a 1982 survey of public transportation systems, the General Accounting Office found that 36 percent of the systems with rail service did not have a single station accessible to wheelchair users; another 36 percent reported that fewer than 10 percent of their stations were accessible. More than one-third of the surveyed transit systems offering bus service did not have a single bus with a lift mechanism to provide access for people in wheelchairs. Some of these transit systems offered paratransit services—special demand-responsive systems (such as "dial-a-bus" programs). But 84 percent reported that, because of eligibility criteria and limited resources, they were periodically unable to comply with requests for transportation, and one-third of the systems maintained waiting lists of persons who wanted, but were not yet permitted, to use the paratransit service for daily commuting.[159]

The problem goes beyond the physical barriers to stations, boarding areas, and vehicles. Some airlines, railroads, and bus companies reportedly engage in practices that exclude or inconvenience handicapped persons. These include refusing to transport people with certain handicaps, requiring personal attendants to accompany disabled people even if they are fully able to travel alone, and denying passage to guide dogs.[160]

Other Areas

Handicapped persons are frequently denied other rights and opportunities that nonhandicapped persons take for

[156] Noakes Associates Architects, *Access Maryland: Handicapped Accessibility Survey* (prepared under State contract) (1980), p. 17.

[157] U.S., Congressional Budget Office, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches* (Budget Issue Paper for FY 1981) (November 1979), p. xi.

[158] "Abroad in the Land," p. 1506.

[159] U.S., General Accounting Office, *Status of Special Efforts To Meet Transportation Needs of the Elderly and Handicapped* (Apr. 15, 1982), pp. 9, 5, 11.

[160] 118 Cong. Rec. 11362-63 (1972) (statement of Rep. Vanik); "History of Unequal Treatment," pp. 865-66.

granted. These include the right to vote,[161] to hold public office,[162] and to obtain a driver's[163] or a hunting and fishing license.[164] Many States restrict the rights of physically and mentally handicapped people to marry[165] and to enter into contracts.[166] Federal law severely limits the opportunity of handicapped aliens to visit or emigrate to the United States.[167] Based on the fact that they are handicapped, parents have had custody of their children challenged in proceedings to terminate parental rights[168] and in proceedings growing out of divorce.[169]

A comprehensive discussion of all facets of discrimination against handicapped persons is beyond the scope of this monograph. To illustrate the breadth of such discrimination and its diverse effect on handicapped people, appendix A outlines the areas of discrimination on the basis of handicap. As this brief discussion and the appendix demonstrate, discriminatory treatment of handicapped people can occur in almost every aspect of their lives.

Forms of Handicap Discrimination

The previous section described the diverse areas in which handicap discrimination occurs. A number of commentators have found the discrimination so severe as to relegate handicapped individuals to "second-class citizenship."[170] This section provides a framework for considering the forms that such discrimination can take.

Conduct, policies, and practices discriminate against handicapped people in several ways: intentional exclusion; unintentional exclusion; segregation; unequal or inferior services, benefits, or activities; less effective services, benefits, or activities; and use of screening criteria with a disparate impact that do not correlate with actual ability.[171]

An intentional exclusion occurs when handicapped people are expressly prohibited from participating in some activity

[161] *See* Robert J. Funk, "A Disenfranchised People: Disabled Citizens and the Fundamental Right to Vote," in *Law Reform in Disability Rights*, vol. I (Berkeley: Disability Rights Education and Defense Fund, 1981), pp. B-1 to B-21; Note, "Mental Disability and the Right to Vote," *Yale L.J.*, vol. 88 (1978), p. 1644; *Legal Rights of Handicapped Persons*, pp. 1033–63.

[162] *See e.g.*, In re Killeen, 121 Misc. 482, 201 N.Y.S. 209 (1923); *Legal Rights of Handicapped Persons*, pp. 1063–68.

[163] *See e.g.*, Ormond v. Garrett, 8 N.C. App. 662, 175 S.E. 2d 371 (1970); Strathie v. Department of Transp., 547 F. Supp. 1367 (E.D. Pa. 1982); Monnier v. United States Dep't of Transp., 465 F. Supp. 718 (E.D. Wis. 1979).

[164] *See, e.g.*, Miss. Code Ann. §49-7-19 (1972).

[165] "History of Unequal Treatment," p. 861; *Legal Rights of Handicapped Persons*, pp. 918–47, and authorities cited therein.

[166] "History of Unequal Treatment," pp. 861–62; *Legal Rights of Handicapped Persons*, pp. 993–1014.

[167] 8 U.S.C. §1182 (a) (1976); *Legal Rights of Handicapped Persons*, pp. 1091–94; "History of Unequal Treatment," p. 862.

[168] *See* authorities cited in *Legal Rights of Handicapped Persons*, pp. 947–92.

[169] *See, e.g.*, In re Marriage of Carney, 157 Cal. Rptr. 383, 598 P.2d 36 (1979); Moye v. Moye, 102 Idaho 170, 627 P.2d 799 (1981).

[170] Eisenberg, Griggins, and Duval, *Disabled People as Second-Class Citizens;* Robert J. Funk, "Disability Rights: From Caste to Class—The Humanization of Disabled People," in *Law Reform in Disability Rights*, vol. 1 (Berkeley: Disability Rights Education and Defense Fund, 1981), p. A-5; Bowe, *Handicapping America*, p. x.

[171] These categories are based in large part upon HHS regulations dealing with discrimination on the basis of handicap. 45 C.F.R. §84.4(b) (1982).

or are expressly denied a service. Examples of such exclusion include policies that prohibit the hiring of job applicants who are blind or have epilepsy, and licensing agencies' rules against granting bus-driving licenses to amputees.

An unintentional exclusion occurs when handicapped people cannot participate in services, programs, and activities because of barriers that were not consciously constructed to have such an effect. Examples of barriers resulting in unintentional exclusion include steps, narrow doorways, escalators, and other architectural barriers that prevent mobility-impaired individuals from entering many buildings and facilities, and rules such as those barring pets, which exclude persons who rely on guide dogs. Although not motivated by ill will or conscious efforts to keep out handicapped people, these barriers exclude just as surely as deliberate prohibitions do.[172]

Segregation singles out handicapped people and separates them from the rest of society, frequently as a condition for receiving some service or benefit. In the past, for instance, handicapped students were often sent as a group to special schools rather than being educated with their nonhandicapped peers. Some restaurants have insisted that handicapped patrons eat in separate dining areas to avoid discomforting other customers. Mental health and mental retardation institutions that house residents in almost complete isolation from the nonhandicapped community are perhaps archetypal examples of segregation.

Sometimes handicapped persons are allowed to participate in services, benefits, and activities but receive something unequal or inferior to what nonhandicapped participants receive. This type of discrimination includes situations in which handicapped workers, although able to perform at equivalent levels, receive lower salaries or must work longer hours than their nonhandicapped coworkers, or where handicapped children attend schools with nonhandicapped children but are relegated to playing cards or board games while the others participate in physical education classes.

In some cases, handicapped people seem to have the same opportunities for services, benefits, and activities as nonhandicapped people. If handicapped people cannot take full advantage of an opportunity, however, its value and effectiveness are diminished for them. Allowing a deaf person to attend a speech or other oral presentation may appear to be equal treatment, for instance, but without an interpreter or some captioning process, the presentation may be less effective for the deaf person than for the rest of the audience. Similarly, without readers or braille materials, treating blind students identically to sighted students by providing printed textbooks will obviously not produce an equally effective educational program.

The use of screening criteria with a disparate effect that do not correlate

[172] Unintentional exclusions can also result from past discrimination, as where educational credentials or job experience criteria are used to exclude handicapped people who were discriminatorily excluded from educational programs or employment opportunities in the past. *Cf.*, U.S., Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* (1981), pp. 13–14.

with actual ability is a less common, but still significant, form of handicap discrimination. Handicapped people receive disproportionately low scores on some tests and other evaluation measures and standards simply because the way the tests are structured prevents people with certain handicaps from demonstrating their knowledge and abilities. Using such tests and standards, without proper adaptation, as criteria for admission to higher education programs and employment may screen out a disproportionate number of learning disabled people, for example, many of whom actually have the mental abilities the tests purportedly measure. This does not single out and exclude the class of learning disabled persons, but it diminishes their chances of being selected for jobs or educational programs.

The various types of handicap discrimination occur in the conduct of individuals, the policies and practices of organizations and agencies, and the law. Where discrimination becomes habitual or is formally adopted, it has a tendency to become self-perpetuating. As a result of inertia, society may retain and obey discriminatory laws, rules, and practices long after their justification and rationale have disappeared.[173]

Discrimination in some areas tends to foster further discrimination in other areas. Inadequate education tends to restrict employment opportunities, resulting in a lowered economic status, which, in turn, limits housing choices. Similarly, lack of access to transportation systems restricts employment, education, housing, and recreational opportunities.[174] Discrimination in one area frequently results in a denial of options in other areas. As the Commission has noted in other contexts, "Discrimination can feed on discrimination in self-perpetuating cycles."[175]

Changing Discriminatory Practices and Prejudiced Attitudes

Remedying the problem of handicap discrimination involves two important elements:[176] ending discriminatory conduct and reducing prejudice. The next chapter describes some of the laws enacted to prohibit discrimination against handicapped people and to promote equality for them in American society. Legal tradition and history in the United States suggest that the law can help mold people's conduct and eradicate proscribed behavior. There is hope that strong laws, vigorously enforced, can dispel practices of discrimination on the basis of handicaps.

Addressing discriminatory practices, however, is only part of the challenge. Discrimination is rooted in widespread prejudice against handicapped people,

[173] *Cf.* sections on individual discrimination, organizational discrimination, and structural discrimination in U.S., Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, pp. 8–13.

[174] American Bar Association, Developmental Disabilities State Legislative Project, *Eliminating Environmental Barriers* (August 1979) (reprinted by U.S. Architectural and Transportation Barriers Compliance Board), p. 1.

[175] U.S., Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, p. 11; *see also* U.S., Commission on Civil Rights, *For All the People. . .By All the People* (1969), p. 122, and *Equal Opportunity in Suburbia* (1974), pp. 9–15.

[176] The two-pronged analysis presented here is outlined in Gittler, "Fair Employment and the Handicapped: A Legal Perspective," pp. 986–87.

and these attitudes also require attention. Because discriminatory practices and prejudices are closely intertwined, an effective remedy of the former must incorporate a remedy for the latter.

Despite the pervasiveness of prejudice against handicapped persons, there are indications that people may be receptive to changing their attitudes about handicaps. Studies suggest that increased positive interaction with handicapped people reduces fears and discomfort and leads to better acceptance of handicapped people.[177] The prejudice that results from simple ignorance and lack of familiarity with handicapped people is thus susceptible to change:

> Attitudes toward disability are often negative because we fear disabilities, we don't understand them, and we feel uncomfortable in situations where we experience fear and uncertainty. Yet these problems can be overcome. Fear can be allayed by offering information that makes disabilities comprehensible, and uncertainties can be reduced by helping people understand what they should and should not do when they are with disabled individuals. Because most Americans have little direct, personal experience with disabilities and little knowledge about them, it is possible that the attitudes of many persons in America today can be made more positive.[178]

It has been argued that prejudice based upon lack of knowledge is less entrenched and easier to change than attitudes based upon familiarity and experience:

> Attitudes based upon extensive contact and detailed information are resistant to change. But the evidence is that few Americans have had either wide-ranging contacts with or accurate information about disabled people. And this is why there is cause for optimism.[179]

The two major avenues for changing such attitudes are through (1) increasing social contact and interaction of nonhandicapped and handicapped people and (2) providing nonhandicapped people with accurate information about handicapped people.[180]

It is generally believed that social interaction between handicapped and nonhandicapped people automatically improves attitudes toward handicaps.[181] Research has indicated, however, that contact, per se, is not uniformly effective at instilling favorable attitudes.[182] Overall, it is true that those who have some contact with handicapped people tend to

[177] *See* authorities cited in Hull, *The Rights of Physically Handicapped People*, pp. 33, 41, n. 8.

[178] Bowe, *Handicapping America*, p. 119.

[179] Ibid., p. 114.

[180] William A. Anthony, "Societal Rehabilitation: Changing Society's Attitudes Toward the Physically and Mentally Disabled," in *Social and Psychological Aspects of Disability*, ed. Joseph Stubbins (Baltimore: University Park Press, 1977), p. 270 (hereafter cited as "Societal Rehabilitation"); Schroedel, *Attitudes Toward Persons With Disabilities: A Compendium of Related Literature*, p. 61.

[181] Schroedel, *Attitudes Toward Persons With Disabilities: A Compendium of Related Literature*, p. 60; Bowe, *Handicapping America*, p. 112.

[182] "Societal Rehabilitation," pp. 270–72, and authorities cited therein; Schroedel, *Attitudes Toward Persons With Disabilities: A Compendium of Related Literature*, pp. 60–61.

have slightly more favorable attitudes than those who have no contact at all,[183] but the effect that contact has on attitudes largely depends on its type and context. Quality rather than quantity of social contact seems to be more important in improving attitudes. Situations in which handicapped people hold subordinate positions or are seen as helpless and dependent foster unfavorable attitudes.[184] "If we see blind beggars rather than blind lawyers, our attitudes are more likely to be negative."[185] Studies have shown that in some circumstances interaction with handicapped persons can actually lead to slightly more negative attitudes.[186] Contact with handicapped persons in medical or institutional settings, for example, appears not to engender the positive attitudes that interaction in social or employment settings does.[187]

Attempts to eradicate prejudicial attitudes by providing nonhandicapped people with accurate information about handicapped persons can take a number of different forms, including books, films, lectures or discussions, television and radio campaigns, training programs, role playing, academic courses, and even the educational effects of legislative enactments.[188] By themselves, however, it is doubtful that such efforts can change attitudes:

> General agreement seems to exist in the literature that regardless of the way in which the information is presented, the power of information alone to produce positive attitude change is negligible.[189]

Even where a person's knowledge about disabled people is demonstrably increased, this increased knowledge does not appear necessarily to carry over to a more favorable attitude.[190]

Although neither contact nor information alone is uniformly effective in improving attitudes toward handicapped people, the combination of these two approaches has a significant effect upon nonhandicapped people's attitudes. One review of the research literature has concluded:

> The findings of these studies appear to be remarkably consistent: Regardless of the type of disability studied, and seemingly independent of the type of contact and information experience provided, all studies reported that a contact-plus-information experience had a favorable impact on the nondisabled person's attitudes.[191]

[183] "Societal Rehabilitation," pp. 270–71.

[184] Schroedel, *Attitudes Toward Persons With Disabilities: A Compendium of Related Literature*, p. 60.

[185] Bowe, *Handicapping America*, p. 114.

[186] "Societal Rehabilitation," p. 270; Schroedel, *Attitudes Toward Persons With Disabilities: A Compendium of Related Literature*, p. 60.

[187] White House Conference on Handicapped Individuals, *Social Concerns: State White House Conference Workbook* (1976), p. 21; English, "Correlates of Stigma Towards Physically Disabled Persons," p. 220.

[188] *See, e.g.*, Safilios-Rothschild, "Prejudice Against the Disabled and Some Means to Combat It," pp. 266–67; Schroedel, *Attitudes Toward Persons With Disabilities: A Compendium of Related Literature*, pp. 16–19; "Societal Rehabilitation," p. 272.

[189] "Societal Rehabilitation," p. 272.

[190] Ibid., p. 273.

[191] Ibid.

Thus, the opportunity to associate with handicapped people, when coupled with information about their disabilities, can significantly improve attitudes toward them.

Chapter 3

Federal Civil Rights Law and Handicapped Persons

This chapter summarizes the existing legal framework governing discrimination against handicapped people. Because the core concept of reasonable accommodation, discussed briefly here and in depth in chapter 6, rests upon this legal foundation, this chapter provides the context within which to understand reasonable accommodation.

Numerous State and Federal laws prohibit discrimination against handicapped persons. The diversity and vast numbers of State laws make summarizing them difficult.[1] Moreover, almost 30 Federal laws prohibit discrimination against handicapped people.[2] Most of these laws originated in the early 1970s when handicapped people sought protections similar to those the civil rights movement had secured for racial and ethnic minorities and women. Consequently, this chapter focuses on four key Federal statutes with broad civil rights provisions and objectives for handicapped people:[3] the

[1] The States have taken a variety of approaches in prohibiting discrimination on the basis of handicap. Some States' antidiscrimination statutes include handicap as an additional category of prohibited discrimination. *See, e.g.,* Ohio Rev. Code Ann. §4112.02 (Page Supp. 1981); Kan. Stat. Ann. §44-1001 (1981).
Frequently, such laws are enforced by State civil rights commissions and similar enforcement agencies. *See, e.g.,* Ind. Code Ann. §22-9-1-6 (Burns Supp. 1982); Kan. Stat. Ann. §44-1001 (1981); Mich. Comp. Laws Ann. §37.1102-.1103 (West Supp. 1982-83); Alaska Stat. §18.80.060(6) (Supp. 1980); Minn. Stat. Ann. §363.04 (West Supp. 1982).
Some States have passed laws prohibiting handicap discrimination in certain specific areas, such as employment or housing. *See, e.g.,* Iowa Code Ann. §§601A.6 and 601A.8 (West 1975 & Supp. 1982-83); Minn. Stat. Ann. §363.03.1-.2 (West Supp. 1982); N.J. Stat. Ann. §10.5-4.1 (West Supp. 1982-83); R.I. Gen. Laws §28-5-5 (1979).
Nearly all of the States have enacted statutes restricting or prohibiting architectural barriers. *See, e.g.,* Me. Rev. Stat. Ann. tit. 25 §§2701-2704 (Supp. 1982-83); S.D. Codified Laws Ann. §5-14-12 (1980); VT. Stat. Ann. tit. 18, §1322 (Supp. 1981).
In addition, a few States have passed constitutional amendments prohibiting certain types of discrimination against handicapped persons. *See, e.g.,* Ill. Const. art. I, §19 (prohibits discrimination based on physical or mental handicap in employment and in the sale or rental of property); Fla. Const. art. 1, §2 (prohibits deprivation of any right because of a physical handicap).

[2] See app. B.

[3] In addition to prohibiting discrimination on the basis of handicap, many of these statutes also create programs delivering services, education,

Rehabilitation Act of 1973, as amended;[4] the Education for All Handicapped Children Act of 1975;[5] the Architectural Barriers Act of 1968, as amended;[6] and the Developmental Disabilities Assistance and Bill of Rights Act, as amended.[7] Federal constitutional guarantees of equal protection of the law and of due process of law also prohibit some kinds of discrimination against handicapped people.

Rehabilitation Act of 1973

The Rehabilitation Act of 1973,[8] as amended in 1978,[9] was a significant step in implementing a national policy to integrate handicapped people into American society.[10] The statute combines a comprehensive Federal-State program providing handicapped people a wide variety of rehabilitation services with broadly worded civil rights protections against discrimination. It is intended to increase employment skills and ability to live independently in the community without the fruits of these programs being frustrated by discrimination.[11] In particular, the act prohibits discrimination against handicapped people by recipients of Federal funds,[12] the Federal Government itself,[13] and Federal contractors.[14]

Several titles of the act are particularly significant in promoting its purposes. Title I sets up the basic vocational rehabilitation program under which handicapped people[15] may receive evaluation and diagnostic services, medical care,

and training to handicapped people. Congress considered both nondiscrimination and the provision of various services essential for achieving the full participation of handicapped people in society. The national policy objective of full participation is discussed in chap. 4.

[4] 29 U.S.C. §§701–796i (1976 & Supp. V 1981).

[5] 20 U.S.C. §§1232, 1400, 1405–1420, 1453 (1976 & Supp. V 1981).

[6] 42 U.S.C. §§4151–4157 (1976).

[7] 42 U.S.C. §§6000–6081 (1976 and Supp. V 1981).

[8] The Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355. The act is the product of a legislative compromise between the Nixon administration and Congress to extend the existing Federal-State vocational rehabilitation system. On October 26, 1972, President Nixon refused to sign and thereby effectively vetoed the Rehabilitation Act of 1972 because he believed it diverted the program from its vocational objective into medical and social welfare policies, added a variety of new categorical programs, and was extremely costly. "Memorandum of Disapproval of Nine Bills," *Public Papers of the Presidents: Richard M. Nixon*, pp. 1042, 1045 (Oct. 27, 1972). Five months later, the President vetoed S.7, a bill that tracked the major provisions of the earlier legislation he had previously refused to sign. "Veto of the Vocational Rehabilitation Bill," *Public Papers of the Presidents*, p. 223 (March 27, 1973). The President and Congress worked out a compromise bill that was signed into law on September 26, 1973. The compromise reduced the funding levels proposed in the vetoed versions; required that the act give equal, not priority service to the severely handicapped; and eliminated several proposed new programs and Federal bodies. For a discussion of the changes made *see* S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2079–2082. The civil rights provisions in Title V, as well as the basic services to be provided, remained untouched.

[9] Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95–602, tit. I, 92 Stat. 2955 (codified in scattered sections of 29 U.S.C.).

[10] For a discussion of the national policy of full participation, see chap. 4.

[11] "The purpose of this chapter is to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living." 29 U.S.C. §701 (Supp. V 1981). *See also* H. Rep. No. 95–1149, 95th Cong., 2d Sess. 1–2, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312–13.

[12] 29 U.S.C. §794 (Supp. V 1981).

[13] *Id.*

[14] 29 U.S.C. §793 (1976 & Supp. V 1981).

[15] The Rehabilitation Act uses two different

counseling, training, and prosthetic devices or other technological aids.[16] These services are provided by local agencies[17] or private organizations under contract or subgrant with the State.[18] The act requires rehabilitation counselors and their clients jointly to develop individualized, written, rehabilitation programs that must be reviewed annually. The programs must set long range and intermediate goals and specify the services and aids to be supplied.[19]

Title VII of the Rehabilitation Act uses supplementary grants to the States to establish a program for "comprehensive services for independent living designed to meet the current and future needs of individuals whose disabilities are so severe that they do not presently have the potential for employment but may benefit from vocational rehabilitation services which will enable them to live and function independently."[20] The services the act funds in support of community living are extremely broad, including counseling, job placement, housing and funds for making housing physically accessible, funds for prosthetic devices, transportation, health maintenance, attendant care, and recreational activities.[21] This section of the act also funds Federal efforts to establish and support centers to help handicapped people live independently in their communities. The centers are staffed primarily by handicapped people and provide a wide variety of services and referrals.[22]

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definitions of handicapped individual. The first definition applies to programs of vocational rehabilitation (and all titles of the act except Titles IV and V). To be eligible for vocational services, an individual must have a physical or mental disability that for such individual constitutes a substantial handicap to employment and reasonably be expected to benefit in terms of employability from vocational rehabilitation. 29 U.S.C. §706(7)(A) (Supp. V 1981). The second definition applies to Titles IV and V of the law, including their prohibitions against discrimination. Under this definition, a person is handicapped if he or she has a physical or mental impairment that substantially limits one or more major life activities, or has a record of such an impairment, or is regarded as having such an impairment. *Id.* §706(7)(B). Definitions of the term handicap are discussed in chap. 1 in the section entitled "Defining Handicaps."

[16] 29 U.S.C. §723(a) (1976 & Supp. V 1981). Title II provides funding for research and establishes the National Institute of Handicapped Research and the Interagency Committee on Handicapped Research. *Id.* §§760–762a. Title III establishes funding for construction and training programs and supplementary services such as interpreters for the deaf and readers for the blind. *Id.* §§770–777f. Title IV establishes the National Council on the Handicapped to evaluate programs and services for the handicapped and to make recommendations for improvements. 29 U.S.C. §§780–785 (Supp. V 1981). Title V contains nondiscrimination provisions discussed in detail below. 29 U.S.C. §§791–794c (1976 & Supp. V 1981). Title VI establishes a community services pilot employment program and a projects with industry program designed to give handicapped persons training and employment to prepare them for the competitive employment market. 29 U.S.C. §§795–795i (Supp. V 1981). Title VII, described above, funds comprehensive programs for independent living. *Id.* §§796–796i.

[17] 34 C.F.R. §361.1 (1982).

[18] 34 C.F.R. §§361.9(a)(5), 361.24(b); *id.* pt. 369 (1982).

[19] 29 U.S.C. §§721(a)(9), 722(a)–(b) (Supp. V 1981).

[20] *Id.* §796.

[21] *Id.* §796a(b).

[22] *Id.* §796e(c)(1)–(2). Such services include: counseling and training in independent living skills, counseling and legal advocacy with respect to legal rights and economic benefits, community group living arrangements, education and training needed for community living, individual and group social and recreational activities, and attendant care and training of such personnel and health maintenance programs.

Title V of the act establishes as national policy the protection of the civil rights of handicapped people. Senator Taft (R-Ohio), a sponsor of the Rehabilitation Act of 1973, speaking in support of the act, declared:

> Too many handicapped Americans are not served at all, too many lack jobs, and too many are underemployed—utilized in capacities well below the levels of their training, education, and ability. . . .[I]f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward elimination of the most disgraceful barrier of all—discrimination.[23]

Although the protections against handicap discrimination are not as sweeping as those prohibiting race and sex discrimination,[24] the three key provisions in Title V do provide significant protection. Of these provisions, section 504[25] has generated both the greatest number of regulations and the most litigation. Section 504 of the Rehabilitation Act states, in part:

> No otherwise qualified handicapped individual in the United States. . .shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .[26]

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[23] 119 Cong. Rec. 24,587 (1973).

[24] For example, Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin, covers most employers and employees in the private sector, State and local government, and the Federal executive branch. 42 U.S.C. §§2000e, 2000e-2, 2000e-16 (1976 & Supp. V 1981). Handicapped Americans are protected from employment discrimination only if their employer receives some form of Federal financial assistance, has a Federal contract, or is the Federal Government itself. 29 U.S.C. §§791, 793-794 (1976 & Supp. V 1981). The 1866 and 1870 Civil Rights Acts protect all persons from discrimination based on race or color in any contract or the sale or purchase of land. 42 U.S.C. §§1981-1982 (1976). Title VIII of the Civil Rights Act of 1968 prohibits housing discrimination on the basis of race, color, national origin, and sex. 42 U.S.C. §3604 (1976). There are no analogous protections for handicapped persons in the sale or rental of real property or in the making of contracts. Handicapped persons are protected from similar acts of discrimination only if the housing is federally financed or built. 29 U.S.C. §794 (Supp. V 1981); *see also* 42 U.S.C. 4151-4157 (1976).

[25] 29 U.S.C. §794 (Supp. V 1981).

[26] *Id.* This language parallels a similar provision in Title VI of the Civil Rights Act of 1964, which bans discrimination on the basis of race, color or national origin. 42 U.S.C. §2000d (1976). Title VI, however, does not reach discriminatory practices of the Federal executive agencies or the U.S. Postal Service that do not constitute Federal financial asistance. Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (1976), uses similar language in prohibiting sex discrimination in educational institutions receiving Federal financial assistance. *Id.* §1681(a). Congress relied on its previous experience in enacting civil rights legislation when it passed §504 of the Rehabilitation Act. *See, e.g.*, S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6390; NAACP v. Medical Center, Inc., 599 F.2d 1247, 1258 (3d Cir. 1979). The origins of §504 probably lie in unsuccessful proposals to amend Titles VI and VII of the Civil Rights Act of 1964 to include prohibitions of discrimination

By its terms section 504 prohibits discrimination on the basis of handicap in any program or activity[27] receiving Federal financial assistance[28] and also reaches discriminatory practices of the Federal Government.[29] This prohibition extends to all areas in which Federal financial assistance is provided, includ-

against the handicapped. Note, "Accommodating the Handicapped: Section 504 After Southeastern," 80 *Colo. L. Rev.* 171, 174, n. 19 (1980), citing H.R. 12154, 92d Cong., 1st Sess., 117 Cong. Rec. 45,945 (1971); H.R. 14033, 92d Cong., 2d Sess., 118 Cong. Rec. 9712 (1972); S. 3044, 92d Cong., 2d Sess., 118 Cong. Rec. 525 (1972). *See also* Garrity v. Galen, 522 F. Supp. 171, 205 (D.N.H. 1981). Congress also amended the Rehabilitation Act in 1978 to provide that the "remedies, procedures and rights" under Title VI should apply to cases brought under §504. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, §505(a)(2), 92 Stat. 2955, 2983 (codified at 29 U.S.C. §794a(a)(2) (Supp. V 1981).

[27] The Supreme Court has ruled that the identical language in Title IX of the Education Amendments of 1972 (prohibiting sex discrimination in educational programs or activities receiving Federal financial assistance) renders that statute "program specific," that is, the act reaches only those parts of a recipient's programs or activities that "receive" Federal aid. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535-40 (1982). The Court, however, did not define "program or activity" or decide whether or when such programs or activities "receive" Federal money. *Id.* at 1927. Federal regulations have interpreted these phrases broadly in light of the remedial purposes of the statute, so that any recipient's programs receiving or benefiting from Federal financial assistance are covered by the act. 28 C.F.R. §41.3(d) (1982). The Reagan administration has indicated its support for a far narrower interpretation by endorsing a district court opinion that would restrict Title IX coverage to programs and activities that directly receive Federal funds specifically earmarked for them. William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Department of Justice, letter to Clarence Pendleton, Chairman, U.S. Commission on Civil Rights, Sept. 16, 1982, endorsing University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982). Also *compare, e.g.,* Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *cert. granted,* 103 S.Ct. 1185 (1983) with Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), *cert. denied,* 456 U.S. 928 (1982).

[28] Not all federally conferred benefits constitute Federal financial assistance. Gottfried v. F.C.C., 655 F.2d 297, 312-314 (D.C. Cir. 1981), *rev'd on other grounds,* 103 S.Ct. 885 (1983) (Federal commercial television licenses issued by FCC do not constitute Federal financial assistance).

[29] 29 U.S.C. §794 (Supp. V 1981). The prohibition contained in this section against discrimination on the basis of handicap in activities conducted by executive agencies or the U.S. Postal Service was added by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Pub. L. No. 95-602, §119(2), 92 Stat. 2955, 2982.

ing, but not limited to, employment,[30] education, housing, transportation, and health and human services.[31] Because section 504 is enforced by all agencies that disburse Federal funds, the President has assigned the Department of Justice to coordinate enforcement activities.[32] The Department of Justice's section 504 coordinating guidelines, originally issued by the U.S. Department of Health, Education and Welfare,[33] set the minimum requirements to be followed by all Federal agencies and departments in issuing their own regulations and enforcing section 504 by administrative action.[34] Section 504 can also be enforced by aggrieved handicapped persons through lawsuits.[35]

The government-wide section 504 guidelines define discrimination broadly

[30] Government-wide regulations subject employment practices to the handicap discrimination prohibition. 28 C.F.R. §41.52–.55. In North Haven v. Bell, 456 U.S. 512, 520–35 (1982), the U.S. Supreme Court ruled that Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex and which uses language similar to §504, applies to employment. Prior to this decision, four courts of appeal held that §504 applies only to employment discrimination where providing employment is a primary objective of the Federal aid or where discrimination in employment necessarily causes discrimination against the primary beneficiaries of the Federal aid. United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir.), *cert. denied,* 449 U.S. 892 (1980); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied,* 442 U.S. 947 (1979); Scanlon v. Atascadero State Hosp., 677 F.2d 1271 (9th Cir. 1982). Two courts of appeal's decisions rendered after *North Haven*—one of which the Supreme Court has decided to review—have gone the other way, holding that employment is covered regardless of the purpose of the Federal funds received. Le Strange v. Consolidated Rail Corp., 687 F.2d 767 (3rd Cir. 1982), *cert. granted,* 103 S.Ct. 1181 (1983); Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376 (11th Cir. 1982), *petition for cert. filed,* 51 U.S.L.W. 3535 (U.S. Jan. 11, 1983) (no. 82–1159).

[31] *See* 28 C.F.R. pt. 41 (1982).

[32] Exec. Order No. 12,250, 3 C.F.R. 298 (1980 Comp.).

[33] The responsibility for coordinating the implementation of §504 has changed. President Ford issued Exec. Order No. 11,914, 3 C.F.R. 177 (1977 Comp.) authorizing the Department of Health, Education, and Welfare (HEW) to coordinate enforcement of §504 for federally assisted programs. President Carter transferred this authority first to the Department of Health and Human Services (HHS) and then, in November 1980, to the Attorney General under Exec. Order No. 12,250, 3 C.F.R. 298 (1980 Comp.).

[34] 28 C.F.R. §41.5 (1982). The Department of Justice is currently working on proposed revisions to the coordination regulations.

[35] *See, e.g.,* Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376 (11th Cir. 1982), *petition for cert. filed,* 51 U.S.L.W. 3535 (U.S. Jan. 11, 1983) (No. 82–1159); Miener v. State of Mo., 673 F.2d 969 (8th Cir.), *cert. denied,* 103 S.Ct. 215, 230 (1982); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981); Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981); Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980); NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d. Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds,* 442 U.S. 397 (1979); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977). Moreover, §505(a)(2) (codified at 29 U.S.C. §794a(a)(2) (Supp. V 1981)), applies the remedies, procedures, and rights available under Title VI of the Civil Rights Act of 1964 to handicapped persons aggrieved by a recipient of Federal financial assistance or a Federal provider of such assistance. The remedies include termination of the Federal funding or other means allowed by law. This section also provides that the prevailing party in any lawsuit under Title V of the Rehabilitation Act is entitled to receive a reasonable attorney's fee. *Id.* §794a(b).

to include practices that directly or indirectly deny opportunities,[36] afford opportunities that are unequal[37] or less effective,[38] or require different or separate opportunities.[39] In addition, recipients cannot use criteria or methods of administration that have the effect of discriminating against handicapped persons, regardless of whether they intended to discriminate.[40] All recipients must provide assurances of compliance with section 504 and must conduct a self-evaluation of their compliance.[41] Employers covered by section 504 are prohibited from discriminating in the hiring and promotion of handicapped persons.[42] Handicapped applicants must meet the essential qualifications for a particular job with reasonable accommodation[43] to their particular disabilities unless such an accommodation would cause an undue hardship to the recipient.[44] Although the regulations do not not use the phrase reasonable accommodation outside of the employment context, making modifications in program operations to permit participation by handicapped people is a consistent theme running throughout the regulations.[45] With respect to removing architectural barriers, the regulations require recipients to operate their programs so that they are "readily accessible to and useable by handicapped persons."[46] Recipients were given 3 years from the effective date of agency regulations to complete necessary structural changes in existing facilities.[47] New facilities and, to the maximum extent feasible, alterations to existing facilities are to be designed and constructed to be readily accessible.[48]

Federal policy under section 504 on making mass public transportation accessible to handicapped persons has changed repeatedly and remains controversial.[49] Regulations of the U.S. Department of Transportation require mass transit authorities to make "special efforts" to provide access to public transportation and give local governments wide latitude in complying with the requirement.[50] The mass transit regula-

[36] 28 C.F.R. §41.51(b)(1)(i) (1982).

[37] *Id.* §41.51(b)(1)(ii).

[38] *Id.* §41.51(b)(1)(iii).

[39] *Id.* §41.51(b)(1)(iv). This prohibition does not apply where different or separate programs or services are necessary to provide qualified handicapped persons with aids, benefits, or services that are as effective as those provided to others. *Id.*

[40] *Id.* §41.51(b)(3).

[41] *Id.* §41.5.

[42] *Id.* §41.4(c)(2).

[43] *Id.* §§41.32(a), 41.53.

[44] *Id.* §41.53.

[45] The Federal regulations and the case law that require differing forms of accommodations for handicapped people are analyzed extensively in chap. 6.

[46] 28 C.F.R. §41.57(a) (1982); 45 C.F.R. §84.22(a) (1982); *See* Charles D. Goldman, "Architectural Barriers: A Perspective On Progress," to be published in *W. New Eng. L. Rev.*, vol. 5, no. 3 (Winter 1983), p. 14 of manuscript.

[47] 22 C.F.R. §41.57(b) (1982).

[48] *Id.* §41.58(a); 45 C.F.R. §84.23(a)–(b) (1982).

[49] The regulatory scheme underlying Federal policy concerning accessible mass transit is both extremely complex and fluid. In addition to the §504 regulations, two Federal funding programs that provide support for public transportation also mandate efforts to make mass transit accessible to handicapped people. Since 1976 the Department of Transportation has issued three different sets of regulations on the subject mandating varying levels of accessibility. The fluctuations of Federal policy and case law concerning accessible mass transit are discussed in detail in chap. 6 in the section entitled "Removing Architectural, Transportation, and Communication Barriers."

[50] 49 C.F.R. §27.77 (1982).

tions have been the basis for much litigation by handicapped people.[51]

Another area of active litigation has been the application of section 504 to elementary and secondary education. The regulations issued originally by the Department of Health, Education, and Welfare and adopted by the Department of Education[52] are consistent with the more detailed requirements of the Education for All Handicapped Children Act of 1975, discussed later in this chapter.[53]

The Federal courts' construction of section 504's mandate continues to develop. Section 504 is increasingly being interpreted as requiring consideration of the abilities of handicapped people on an individual basis, taking into account available modifications, services, and devices that would permit them to participate in programs and activities and, in some instances, requiring individualization of opportunities.[54]

This interpretation is consistent with the U.S. Supreme Court's only extensive analysis of section 504. In *Southeastern Community College v. Davis,*[55] discussed extensively in chapter 6, the Court explored the limits of the duty to eliminate discrimination through accommodation to a hearing-impaired student seeking admission to a nurse training program. The Court held that there were no available accommodations that would have permitted a hearing-impaired nursing student to participate in the program, and that section 504 did not require fundamental alteration in the nature of a program[56] or modifications that could cause undue financial and administrative hardship.[57]

Since the Supreme Court's decision in *Davis,* Federal courts have required that reasonable accommodations be considered or provided to handicapped persons pursuant to section 504 in a variety of situations, including: the provision of sign language interpreters for deaf college students,[58] provision of an extended school year for mentally retarded pupils,[59] permission for a deaf applicant to use hearing aids or telephone amplification devices during testing for Federal employment,[60] and provision of different ways of administering tests to a job applicant with dyslexia.[61]

Another antidiscrimination provision in the Rehabilitation Act, section 503,[62]

[51] *See, e.g.,* Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

[52] 34 C.F.R. pt. 104 (1982).

[53] Cases litigating the application of §504 and its regulations to education programs are noted in the discussion below on the Education for All Handicapped Children Act.

[54] Chap. 6 of this report discusses extensively the issue of overcoming such barriers through reasonable accommodation.

[55] 442 U.S. 397 (1979).

[56] *Id.* at 405, 410, 413.

[57] *Id.* at 412.

[58] Jones v. Illinois Dep't of Rehabilitation Serv., 689 F.2d 724 (7th Cir. 1982); Camenisch v. University of Tex., 616 F.2d 127 (5th Cir. 1980), *rev'd on other grounds,* 451 U.S. 390 (1981). *But cf.* Board of Educ. v. Rowley, 102 S.Ct. 3034 (1982).

[59] Phipps v. New Hanover Bd. of Educ., 551 F. Supp. 732, 734-35 (E.D. N.C. 1982); Garrity v. Galen, 522 F. Supp. 171, 218, 240 (D.N.H. 1981); Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263, 1279-81 (N.D. Ga. 1981). *See also* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980) (EAHCA only), *cert. denied,* 452 U.S. 968 (1981).

[60] Crane v. Lewis, 551 F. Supp 27 (D.D.C. 1982).

[61] Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983). The developing legal standards for reasonable accommodation are discussed in chap. 6.

[62] 29 U.S.C. §793 (1976 & Supp. V 1981).

requires businesses with Federal contracts of $2,500 or more to take affirmative action to employ and advance qualified handicapped individuals. This affirmative action requirement is enforced by the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor.[63] Regulations issued by the Department require Federal Government contracts to contain clauses that prohibit employment discrimination against qualified handicapped persons[64] and mandate affirmative action to hire and promote them.[65]

The regulations define a qualified handicapped person as a handicapped person "who is capable of performing a particular job, with reasonable accommodation to his handicap."[66] The regulations further specify that contractors "must make a reasonable accommodation to the physical and mental limitations of an employee or applicant. . . ."[67] Although the regulations do not define what constitutes a reasonable accommodation, appendix B to the regulations provides a sample notice to employees that characterizes accommodations as "the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, or other accommodations."[68] The duty imposed upon Federal contractors to take steps to mitigate the effects on job performance of an individual's handicapping condition is not unlimited; a contractor may take into account both business necessity and costs.[69]

[63] 41 C.F.R. pt. 60-741 (1982). OFCCP also enforces affirmative action in Federal employment for certain disabled veterans as required by the Vietnam Era Veterans Readjustment Act, 38 U.S.C. §2012 (1976 Supp. V 1981). OFCCP also enforces Executive Order No. 11,246, which requires Federal contractors with contracts of $10,000 or more to take affirmative action in hiring and promoting women and racial or ethnic minorities. Section 503, unlike §504, cannot be enforced by private lawsuits brought by aggrieved handicapped persons. *See* Beam v. Sun Shipbldg. & Dry Dock Co., 679 F.2d 1077 (3d Cir. 1982); Davis v. United Airlines, 662 F.2d 120 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 2045 (1982); Fisher v. Tucson, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 178 (1982); Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979).

[64] 41 C.F.R. §60-741.4 (1982).

[65] *Id.* §60-741.6. The regulations do not provide a clear description of what is required in order to avoid discrimination and what is required to fulfill the affirmative action requirement. The distinction between affirmative action and nondiscrimination is discussed in chaps. 6 and 7. Contractors with 50 or more employees or $50,000 or more in Federal contracts must have a written affirmative action plan. §60-741.5(a).

[66] 41 C.F.R. §60-741.2 (1982). The regulations further note that "to the extent that qualification requirements tend to screen out qualified handicapped individuals, the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job." *Id.* §60-741.6(C)(2). *See* E. E. Black, Ltd. v. Marshall, 497 F. Supp 1088, 1103 (D. Haw. 1980).

[67] 41 C.F.R. §60-741.5(d) (1982).

[68] *Id.* pt. 60-741, app. B (1982).

[69] *Id.* §741.6(d). The "business necessity" defense to discrimination was first developed with respect to Title VII of the Civil Rights Act of 1964 (codified at 42 U.S.C. §§2000e to 2000e-17) which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. One court has succinctly summarized the concept as follows:

> The test is whether there exists an overriding legitimate business purpose such that the

As part of their affirmative action obligations, Federal contractors must undertake a self-analysis of their personnel processes to ensure that handicapped applicants and employees are carefully, thoroughly, and systematically considered for hiring and promotions.[70] The employer must also assess physical or mental job qualifications that tend to screen out qualified handicapped people and must modify such job qualifications to ensure they are job related and consistent with business necessity.[71] Depending upon the results of this self-analysis, the employer is advised to actively publicize its affirmative action policies to recruit more handicapped applicants and to hire and promote handicapped employees.[72]

Section 501 of the Rehabilitation Act[73] carries out Congress' intent that the Federal Government be an exemplary equal opportunity employer of handicapped people.[74] It requires each Federal department or agency, including the U.S. Postal Service, to establish an affirmative action plan to encourage the hiring, placement, and promotion of handicapped individuals.[75] The law also establishes an Interagency Committee on Handicapped Employees to encourage increased employment of handicapped people by the government.[76] Section 501 both prohibits handicap discrimination in Federal employment and mandates affirmative action.[77] Under the affirmative action component of section 501, all Federal agencies and the Postal Service are required annually to establish written affirmative action plans that specify goals for the employment and advancement of handicapped applicants and employees within the Federal work force.[78] Agencies are to emphasize employment of people with certain targeted disabilities: deafness, blindness, missing extremities, partial or complete paralysis, convulsive disorders, mental retardation, mental illness, and distortion of the spine or limbs.[79] Agencies with more than 500 employees must establish numerical goals for employment of persons with targeted disabilities.[80] Agencies must also establish a special recruitment

> [challenged employment] practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. [footnotes omitted].
>
> Robinson v. Lorillard, 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006–07 (1971, 1972). *See also* Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (7th Cir. 1982).

[70] 41 C.F.R. §60.741.6(b) (1982).

[71] *Id.* §60–741.6(c).

[72] *Id.* 60–741.6(f).

[73] 29 U.S.C. §791 (1976).

[74] *See* comments of Senator Cranston, one of the authors of the original act and the 1978 amendments, 124 Cong. Rec. 30347 (1978). *See also* 29 U.S.C. §794a(a)(1) (Supp. V 1981); 29 C.F.R. §1613.703 (1982).

[75] 29 U.S.C. §791(b) (1976).

[76] *Id.* §791(a).

[77] Shirey v. Devine, 670 F.2d 1188, 1200–04 (D.C. Cir. 1982).

[78] U.S., Equal Employment Opportunity Commission, Management Directive 711, Nov. 2, 1982, p. 2.

[79] Ibid., p. 3.

[80] Ibid. All handicapped persons, as broadly defined in the Rehabilitation Act (see discussion in chap. 1 in the section entitled "Defining Handicaps") are covered by both the nondiscrimination and the affirmative action provisions of §501.

program and goals and timetables for facility accessibility.[81]

Section 501 regulations promulgated by the U.S. Equal Employment Opportunity Commission (EEOC)[82] set out specific standards with respect to reasonable accommodation,[83] employment criteria,[84] preemployment inquiries,[85] and physical access to buildings.[86] Federal employees and applicants for Federal employment who believe they have been subjected to discrimination because of their handicap may file a complaint with EEOC[87] and, if unsuccessful through the administrative route, may file a lawsuit in Federal court.[88]

Education for All Handicapped Children Act

The Education for All Handicapped Children Act, also referred to as Public Law 94-142, was enacted in 1975[89] because of congressional concern and dissatisfaction with the complete exclusion of millions of handicapped children from the Nation's public schools and with the inappropriateness of educational programs available to additional millions of handicapped children.[90] To remedy these problems and "to provide assistance to the States in carrying out their responsibilities. . .to provide equal protection of the laws,"[91] Congress incorporated in the act principles derived from

[81] Ibid., pp. 3-4.

[82] 29 C.F.R. pt. 1613, subpt. G (1982).

[83] *Id.* §1613.704. §505(a)(1) of the Rehabilitation Act specifically permits courts to take into account "the reasonableness of the cost of any necessary work place accommodation, and the availability of any alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy." 29 U.S.C. §794a(a)(1) (Supp. V 1981).

[84] 29 C.F.R. §1613.705 (1982).

[85] *Id.* §1613.706.

[86] *Id.* §1613.707.

[87] 29 U.S.C. §794a(a)(1) (Supp. V 1981). In addition, discrimination on the basis of handicap is a prohibited personnel practice, and Federal employees may appeal employer-initiated adverse actions allegedly based upon such a prohibited practice to the U.S. Merit Systems Protection Board. 5 U.S.C. §§2302(b)(1)(D), 7701(c)(2)(b) (Supp. V 1981).

[88] 29 U.S.C. §794a(a)(1) (Supp. V 1981).

[89] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§1232, 1400, 1401, 1405-1420, 1453) (1976 and Supp. V 1981). Public Law 94-142 was itself an amendment and substantial revision of the Education of the Handicapped Act, Pub. L. No. 91-230, tit. VI, 84 Stat. 175 (1970). The combination of these two acts is collectively referred to as the "Education of the Handicapped Act." *See* 20 U.S.C. §§1401-1461 (1976 & Supp. V 1981). This chapter uses the title Education for All Handicapped Children Act because that act's substantive provisions are pertinent to this report.

[90] The statute is supported by congressional findings of discrimination, 20 U.S.C. §1400(b) (Supp. V 1981), which are quoted in chap. 2 in the subsection entitled "Education." *See* S. Rep. No. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1432); H.R. Rep. No. 332, 94th Cong., 1st Sess. 2 (1975). *See also* Board of Educ. v. Rowley, 102 S. Ct. 3034, 3043, 3045-46 (1982) (reviewing the legislative history of the Education for All Handicapped Children Act). Congress' first effort to assist States in the education of handicapped children was an amendment to the Elementary and Secondary Education Act of 1965 establishing a grant program to States that established or expanded educational programs for the handicapped. Pub. L. No. 89-750, §161, 80 Stat. 1204 (1966). In 1970 Congress passed the more comprehensive Education for the Handicapped act, Pub. L. No. 91-230, tit. VI, 84 Stat. 175. Part B of the 1970 act (84 Stat. 178) extended the earlier grant program. Seeking to stimulate expanded State efforts in the area, neither statute had specific guidelines dictating how the States were to use the funds. Congressional dissatisfaction with the results of these programs led to the 1975 bill.

[91] S. Rep. No. 168, 94th Cong., 1st Sess. 13, *reprinted in* 1975 U.S. Code Cong. & Ad. News

Federal court decisions regarding equal educational opportunity for handicapped children.[92]

Federal grants to State and local agencies under the law are provided in accordance with a detailed funding formula. They are preconditioned upon a State's compliance with equal educational opportunity procedures and goals set out in the statute. To qualify, a State must demonstrate it "has in effect a policy that assures all handicapped children the right to a free appropriate public education."[93] This policy must be reflected in a State plan that describes the goals, programs, and timetables under which the State intends to educate handicapped children within its borders; the plan must be submitted to and approved by the U.S. Secretary of Education.[94]

The act sets out a number of major requirements:

Identifying Handicapped Children. Each State must undertake procedures to identify, locate, and evaluate all handicapped children residing there.[95] This requirement grew out of congressional findings that large numbers of handicapped children were not receiving an appropriate education because their handicaps were undetected or misclassified.[96]

Individualized Education Program. To ensure the tailoring of educational programs to each child's unique needs, education agencies must develop an individualized education program (IEP) for each handicapped child. An IEP is a written statement developed at a meeting of a representative of the local education agency, the teacher, the parents, and when appropriate, the child. The IEP must include: (a) a statement of the present levels of educational performance of the child; (b) a statement of annual goals, including short-term, instructional objectives; (c) a statement of the specific educational services to be provided to the child and the extent to which the child will be able to participate in regular educational programs; (d) the projected date for initiation of such services and their anticipated duration; and (e) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the plan is achieving the stated instructional goals.[97]

Nondiscriminatory Testing. States must establish procedures to assure that the testing and evaluation materials and procedures used to evaluate and place handicapped children are not racially or culturally discriminatory.[98]

Procedural Safeguards. The act specifies comprehensive procedural requirements, such as written notice, due process hearings, access to records, and

1437. Significantly, recipients of funds under this law are required to make positive efforts to employ and promote qualified handicapped persons. 20 U.S.C. §1405 (1976).

[92] *E.g.*, Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972) and Mills v. Board of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972). S. Rep. No. 168, 94th Cong., Sess. 6–7, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1430–31. The influence of these cases on Pub. L. No. 94–142 is discussed by the Supreme Court in Board of Educ. v. Rowley, 102 S.Ct. at 3043–44; the decision also contains a brief summary of previous Federal statutory developments regarding the education of handicapped persons. *Id.* at 3037.

[93] 20 U.S.C. §1412(1) (1976).

[94] *Id.* §§1412(2), 1413.

[95] *Id.* §1412(2)(C).

[96] 20 U.S.C. §1400(b)(5) (Supp. V 1981).

[97] 20 U.S.C. §1401(19) (1976).

[98] *Id.* §1412(5)(C).

right to counsel, permitting parental or guardian challenges to an IEP or its implementation by school authorities.[99] Parties to a hearing in a local school district are entitled to have the State educational agency review the hearing decision[100] and to appeal the final decision to State or Federal court.[101] Federal district courts are expressly given jurisdiction over such actions.[102] States must set procedures (often called surrogate parent procedures) for the representation of children whose parents are unknown or unavailable or who are wards of the State.[103]

Least Restrictive Environment. Education agencies must establish procedures for assuring that handicapped children are educated with nonhandicapped children to the maximum extent appropriate. Removal of handicapped children from the regular educational environment may occur only when the nature or degree of the handicap is such that education in regular classes cannot be accomplished satisfactorily even with the use of supplementary aids and services.[104]

Periodic Reviews. IEPs must be evaluated at least annually to determine their effectiveness in meeting the educational needs of each handicapped child.[105]

To make the act work for their children, many parents of handicapped children have sued for enforcement of their rights. The results of this litigation have largely been to uphold both the letter and the spirit of the act's intent to ensure that all handicapped children receive appropriate education.[106]

The U.S. Supreme Court's first interpretation of this law came in *Board of Education of Hendrick Hudson Central School District v. Rowley.*[107] The parents of an elementary student with only minimal residual hearing filed suit to force the school district to provide a sign language interpreter for their daughter in the classroom. The school district was already providing the child with a hearing aid and tutors after school, and the child was performing better than average and was passing easily from grade to grade, despite the fact she could only understand approximately 50 percent of what was being said in the classroom.[108]

The Supreme Court rejected the parents' claim that the Education for All Handicapped Children Act required

[99] *Id.* §1415(b),(d).
[100] *Id.* §1415(c).
[101] *Id.* §1415(e).
[102] *Id.* §1415(e)(4).
[103] *Id.* §1415(b)(1)(B).
[104] *Id.* §1412(5).
[105] *Id.* §1413(a)(11).
[106] *See, e.g.,* Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983); Hessler v. State Bd. of Educ., 700 F.2d 134 (4th Cir. 1983); Springdale School Dist. No. 50 v. Grace, 693 F.2d 41 (8th Cir. 1982), *cert. denied,* 103 S.Ct. 2086 (1983); Doe v. Aurig, 692 F.2d 800 (1st Cir. 1982); Tockarcik v. Forest Hills School Dist., 665 F.2d 443 (3d Cir. 1981), *cert. denied, sub nom.* Scanlon v. Tokarcik, 102 S.Ct. 3508 (1982); New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982); Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied,* 452 U.S. 968 (1981); Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980); Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869 (S.D. Texas 1981); Association for Retarded Citizens v. Frazier, 517 F.Supp. 105 (D. Colo. 1981); Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. G. 1981).
[107] 102 S.Ct. 3034 (1982).
[108] *Id.* at 3039–40.

States to realize the maximum potential of each handicapped child:[109] "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make. . .access [to public education] meaningful."[110] The Court construed the Education for All Handicapped Children Act to require an adequate, meaningful education but not an education necessarily equal in all respects to the education received by other children, nor an education designed to bring each child to his or her highest possible level of educational achievement.[111] In so ruling, the Court acknowledged Congress' intent that all handicapped children be educated and recognized that Congress had imposed extensive requirements, including formulation of the IEP and guarantees of parental involvement throughout the educational placement process, to assure that this objective was achieved.[112]

Developmental Disabilities Assistance and Bill of Rights Act

The Developmental Disablities Assistance and Bill of Rights act[113] focuses on a specific group of handicapped persons. The act continues a Federal-State grant program to assist and encourage States to improve care and training for developmentally disabled citizens.[114]

The term "developmental disability" is a legal hybrid comprising disabilities attributable to mental or physical impairments that cause substantial functional limitations in three or more of the following life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic sufficiency. The disability must start before a person reaches the age of 22 and be likely to continue indefinitely. To be considered developmentally disabled a person must also need extended, individually planned and coordinated, interdisciplinary care or treatment.[115]

Congress explained the needs of the targeted group, the problems they face, and national objectives in the preamble to this law:

> (1) there are more than two million persons with developmental disabilities in the United States;
>
> (2) individuals with disabilities occurring during their developmental period are more vulnerable and less able to reach an independent level of existence than other handicapped individuals. . . .
>
> (3) persons with developmental disabilities often require specialized lifelong services to be provided by many agencies in a coordinated manner in order to meet the person's needs;
>
> (4) general service agencies and agencies providing specialized ser-

[109] *Id.* at 3046–48.

[110] *Id.* at 3043.

[111] *Id.* at 3046–47.

[112] *Id.* at 3037–39, 3050.

[113] Codified at 42 U.S.C. §§6000–81 (1976 & Supp. V 1981).

[114] 42 U.S.C. §6000(b) (Supp. V 1981). For a discussion of the act's provisions and purposes, *see* Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 11–14 (1981).

[115] 42 U.S.C. §6001(7) (Supp. V 1981). See chap. 1 in the section entitled "Defining 'Handicaps'."

> vices to disabled persons tend to overlook or exclude persons with developmental disabilities in their planning and delivery of services; and
>
> (5) it is in the national interest to strengthen specific programs, especially programs that reduce or eliminate the need for institutional care, to meet the needs of persons with developmental disabilities.[116]

Congress' "overall purpose. . .[is] to assist States to assure that persons with developmental disabilities receive the care, treatment, and other services necessary to enable them to achieve their maximum potential through a system which coordinates, monitors, plans, and evaluates those services and which ensures the protection of the legal and human rights of persons with developmental disabilities."[117]

Participating States must use funds allocated under the act in accordance with a State plan approved by the Secretary of the Department of Health and Human Services.[118] A plan must include assurances that every developmentally disabled person receiving services from any program funded under the act has a written, individual, habilitation plan.[119] Individualized plans must state interme-

[116] *Id.* §6000(a).

[117] *Id.* §6000(b)(1). Congress has attempted to improve programs for mentally retarded individuals, the original class of disabled persons from which the class of developmentally disabled persons was created, over the past 20 years. President Kennedy sent to Congress a message regarding mental illness and mental retardation. "Special Message to the Congress on Mental Illness and Mental Retardation," *Public Papers of the Presidents: John F. Kennedy,*, p. 126 (Feb. 5, 1963), *reprinted in* 1963 U.S. Code Cong. & Ad. News 1466. That message called for legislation to eradicate the causes of mental retardation and to improve conditions in facilities serving the mentally retarded. Congress responded by passing the Maternal and Child Health and Mental Retardation Planning Amendments of 1963, Pub. L. 88-156, §5, 77 Stat. 275, and the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282. These programs were expanded in the Mental Retardation Facilities and Community Mental Health Centers Construction Act Amendments of 1965, Pub. L. No. 89-105, 79 Stat. 427, and in the Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat 286, under which funds were made available so that States could begin to implement their comprehensive mental retardation plans developed with previous funding. Pub. L. No. 89-105, §220, 79 Stat. 428; Pub. L. No. 89-97, §211, 79 Stat. 356. Congress broadened its concern to include other neurological disorders such as cerebral palsy, epilepsy, and similar conditions requiring similar treatment, in the Developmental Disabilities Services and Facilities Construction Amendments of 1970, Pub. L. No. 91-517, 84 Stat. 1316. In 1975 Congress passed the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486. The current act consists principally of amendments from the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, tit. V, 92 Stat. 3003.

[118] 42 U.S.C. §6062(a)(1) (Supp. V 1981). Subchapter III of the act provides funds pursuant to the approved State plan for planning and services for developmentally disabled persons and specifies extensive requirements for the State plans, including the creation of a State planning council to devise and oversee the implementation of the plan. 42 U.S.C. §§6061-6068 (1976 & Supp. V 1981). Subchapter II authorizes grants to university-affiliated centers and satellite centers for training and research activities. 42 U.S.C. §§6031-6033 (Supp. V 1981). Subchapter IV authorizes the funding of grants for demonstration programs that have promise for expanding or improving protection and advocacy or other services to developmentally disabled persons. 42 U.S.C. §6081 (Supp. V 1981).

[119] 42 U.S.C. §6011 (1976 & Supp. V 1981). "The American Psychiatric Association explains that

diate and long term habilitation objectives, the means to achieve those objectives, criteria for evaluating the effectiveness of the program, and the coordinator responsible for its implementation.[120] The individual habilitation plan must be reviewed annually by the agency providing habilitation services in conference with the client and, where appropriate, the client's parents.[121]

In addition to mandating delivery of coordinated, individualized services considered essential by Congress, Congress also provided a "Bill of Rights." It declares that developmentally disabled persons have "a right to appropriate treatment, services and habilitation" that "maximize the developmental potential of the person. . .[and are] provided in the setting that is least restrictive of the person's personal liberty."[122]

Congress required that each State have in place, as a condition for receiving Federal funds, a system to protect and advocate the rights of developmentally disabled individuals.[123] Each recipient of funds under this law also must take affirmative action to hire and promote qualified handicapped individuals.[124]

The United States Supreme Court in *Pennhurst State School and Hospital v. Halderman,*[125] its first decision interpreting this statute, concluded that Congress did not intend in the bill of rights section of the act to create enforceable obligations upon the States to provide habilitation in the least restrictive setting.[126] Although this declaration of rights is, therefore, not directly binding upon the States, it is a clear expression of congressional policy and a preference for certain kinds of treatment.[127]

Architectural Barriers Act

The Architectural Barriers Act of 1968, as amended,[128] requires generally that all buildings constructed or altered or financed by the Federal Government be accessible to and usable by physically handicapped persons in accordance with

'[t]he word 'habilitation,". . .is commonly used to refer to programs for the mentally retarded because mental retardation is. . .a learning disability and training impairment'. . . .[T]he principal focus of habilitation is upon training and development of needed skills." Youngberg v. Romeo, 102 S.Ct. 2452, 2454 n.1(1982).

[120] 42 U.S.C. §6011(b)(3) (Supp. V 1981).

[121] 42 U.S.C. §6011(c) (1976).

[122] 42 U.S.C. §6010(1)–(2) (1976 & Supp. V 1981).

[123] 42 U.S.C. §6012 (Supp. V 1981).

[124] 42 U.S.C. §6005 (1976).

[125] 451 U.S. 1 (1981).

[126] 451 U.S. at 11–32 (1981). The Court expressly left open, as a question for remand, whether other sections of the act, including 42 U.S.C. §6063(b)(5)(c) (1976 & Supp. IV 1980) which incorporates the Bill of Rights section by explicit reference, create enforceable rights. 451 U.S. at 13–14, 27–30. On remand, the circuit court expressly acknowledged that these questions of enforceability of other sections of the act still remained, but did not reach them because of its conclusion that Pennsylvania standards created such rights. Halderman v. Pennhurst State School and Hosp., 673 F.2d 647, 650–656 (3d Cir. 1982). The Supreme Court has, however, decided that those persons who have been involuntarily committed to mental retardation facilities have a constitutional right, under the due process clause of the 14th amendment, to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as may reasonably be required by these liberty interests. Youngberg v. Romeo, 102 S.Ct. 2452 (1982). In addition, Congress enacted the Civil Rights of Instititutionalized Persons Act, 42 U.S.C. §1997–1997j (Supp. V 1981), granting the Attorney General the authority to bring suit to enforce the civil rights of persons in jails, prisons, and mental health and mental retardation facilities.

[127] 451 U.S. at 19.

[128] 42 U.S.C. §§4151–4157 (1976).

standards established by the government.[129] In 1973 Congress created the Architectural and Transportation Barriers Compliance Board[130] and in 1978 empowered it to "establish minimum guidelines and requirements for standards" issued under the Architectural Barriers Act.[131] After considerable controversy, and several different versions,[132] the Board issued minimum guidelines and requirements for accessible design that became effective September 3, 1982.[133] The U.S General Services Administration, the Department of Defense, the Department of Housing and Urban Development, and the U.S. Postal Service, all of which had issued accessibility regulations prior to the issuance of the Board's minimum guidelines,[134] now are required by law to revise their regulations to make them consistent with the Board's.[135] The Board can enforce these Federal accessibility regulations through administrative proceedings as well as litigation,[136] and it has used this authority to hold several administrative enforcement hearings on accessibilty issues in Federal buildings.[137] The Board is additionally empowered to study and work for the elimination of attitudinal, architectural, and communications barriers to disabled people.[138]

Constitutional Protections for Handicapped Persons

Handicapped people have also used constitutional rights tc challenge government actions, concentrating initially on rights to equal educational opportunity[139] and to treatment for those involuntarily confined to institutions for the mentally disabled.[140] The most frequently used constitutional bases are the guar-

[129] Specifically, the law applies to public buildings or any building that may result in the employment or residence of a physically handicapped person and that was (1) constructed or altered by or on behalf of the United States; (2) leased in whole or in part by the United States after August 12, 1968; (3) financed in whole or in part by a grant or loan from the United States after August 12, 1968 where the government was prescribing design standards; or (4) the Washington, D.C., subway system. *Id.* §4151.

[130] 29 U.S.C. §792 (1976 & Supp. V 1981).

[131] 29 U.S.C §792(b)(7) (Supp. V 1981).

[132] A history of the development of the minimum guidelines is discussed at 47 Fed. Reg. 33862-33864 (1982).

[133] *Id.* at 33862 (to be codified at 36 C.F.R. pt. 1190).

[134] *See* General Services Administration, 41 C.F.R. 101-19.600-.607 (1982); Department of Housing and Urban Development, 24 C.F.R. pt. 40 (1982); Department of Defense, 4279-1-M "Construction Criteria," June 1, 1978, para. 5-6; U.S. Postal Service, Postal Service Contracting Manual, Publication 41 §14-518.4, as amended by handbook RE-4, November 1979, 39 C.F.R. 601.100 (1982).

[135] 29 U.S.C. §792(b)(1),(7) (Supp. V 1981). *See also* 47 Fed. Reg. 33862 (1982).

[136] 29 U.S.C. §792(d) (Supp. V 1981).

[137] *See* U.S., Architectural and Transportation Barriers Compliance Board, *Report of the Board to the President for 1982,* pp. 9-10.

[138] 29 U.S.C. §792(b)(2), (3) (Supp. V 1981).

[139] *See, e.g.,* Mills v. Board of Educ. of D.C., 348 F. Supp 866 (D. D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). The constitutional principle that handicapped children are entitled to the same free, appropriate public education received by nonhandicapped children was incorporated into the Education for All Handicapped Children Act. Hendrick Hudson Cent. School Dist. v. Rowley, 102 S.Ct. 3034, 3043-44 (1982).

[140] *See, e.g.,* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part and vacated and remanded in part,* 550 F.2d 1122 (8th Cir. 1977). Cases such as these provided some of the legal foundation to the Developmental Disabilities Assistance and Bill of Rights Act.

antees of equal protection of the law and due process of the law.[141]

Equal protection of the law is the constitutional mandate that government must make only reasonable classifications that pursue legitimate objectives and may not employ unjustified distinctions to disadvantage groups of people. Equal protection guarantees often depend upon the choice of which of several standards the courts apply to governmental action that classifies people and causes differential treatment of the classes.

When the government classifies people on certain bases, such as race or national origin, the courts have found such classifications extremely "suspect."[142] The courts have viewed with similar suspicion governmental activity that interferes with fundamental rights, such as voting or the right to interstate travel.[143] In other contexts, particularly sex discrimination cases, the Supreme Court has applied a "moderate scrutiny" standard.[144] In situations where neither a suspect class nor fundamental rights were at stake, the Court has used a "rational basis" test. All the rational basis test requires is that a classification be reasonably related to a legitimate governmental objective.[145]

Little uniformity has emerged in various court decisions in regard to the appropriate equal protection standard applicable to classifications that disadvantage handicapped persons. The courts that have considered equal protection challenges by handicapped plaintiffs have employed every imaginable standard.[146] Handicapped persons have, nonetheless, been successful in using the

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[141] Those guarantees are contained in U.S. Const., Amend. XIV, §1, which provides in pertinent part: "No state shall. . .deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Both guarantees also apply to the Federal Government through the fifth amendment. Bolling v. Sharpe, 347 U.S. 497 (1954). Due process and equal protection are not the only constitutional protections that have been used by handicapped persons. Other claims include the 8th amendment's prohibition against cruel and unusual punishment, New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 764 (E.D. N.Y. 1973); the 13th amendment's prohibition against involuntary servitude as prohibiting forced unpaid labor in State institutions, *e.g.*, Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966); the constitutionally based right to privacy, *e.g.*, Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417, 424-27, 435 (1977).

[142] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 9 (1967); Oyama v. California, 332 U.S. 633, 646 (1948). Alienage has also been held to be a suspect classification. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

[143] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

[144] *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971). In the 1970s and 1980s the Supreme Court appears to have deviated to some degree from the two-tiered approach of reference to reasonable governmental classification and interference with suspect classification. Although generally refusing to expand the list of classifications considered suspect or to recognize any additional fundamental rights, the Court has added new teeth to the rational basis test and in several cases has applied what amounts to "moderate" scrutiny of classifications challenged as being in violation of equal protection. *See, e.g.*, Gunther, "The Supreme Court, 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," *Harv. L. Rev.*, vol. 80 (1972), p. 1; Gerald Nowak, "Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications," *Geo. L.J.*, vol. 86 (1974), p. 1071.

[145] *See* McDonald v. Board of Election, 394 U.S. 802, 809 (1969).

[146] Some of the rulings have found a violation of equal protection through application of the mini-

equal protection clause to gain many significant rights.

The most far-reaching equal protection decisions for handicapped persons have come in the area of education. Many courts have ruled that the equal protection clause requires the provision of a free, appropriate, public education for all handicapped children as is provided to nonhandicapped children.[147] Equal protection has also been used to challenge commitment procedures and conditions of confinement in mental institutions.[148] In *Jackson v. Indiana,*[149] the U.S. Supreme Court struck down a State law that permitted mentally incompetent criminal defendants to be committed to an institution indefinitely until they were determined to be competent to stand trial. Equal protection challenges have also been effective in eliminating restrictions upon mentally retarded persons' right to vote[150] and restrictions on occupancy of hotels and boarding houses.[151]

The due process clause of the 14th amendment has been used in various ways to secure rights for handicapped people. One of the most familiar requirements imposed by the due process clause is that the government may infringe upon neither property, life, nor liberty without affording adequate notice and an opportunity to be heard.[152] Handicapped persons have successfully used this right to procedural due process to

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mal "rational basis test." *See, e.g.,* Vecchione v. Wohlgemuth, 377 F. Supp. 1361, 1368 (E.D. Pa. 1974), *aff'd,* 558 F.2d 150 (3d Cir.), *cert. denied,* 434 U.S. 943 (1977); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 297 (E.D. Pa. 1972); In re Downey, 72 Misc.2d 772, 340 N.Y.S.2d 687 (1973). Some cases have applied the emerging "moderate scrutiny test" of equal protection. *See, e.g.,* Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976); In re Jessup, 85 Misc.2d 575, 379 N.Y.S.2d 626 (Fam. Ct. 1975). Several decisions have applied "strict scrutiny" because a fundamental right was at stake. *See, e.g.,* Stoner v. Miller, 377 F. Supp. 177, 180 (E.D. N.Y. 1974) (right to travel); North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 458 (M.D. N.C. 1976) (procreation). Many cases have failed to specify what equal protection standard was being applied. *See, e.g.,* Jackson v. Indiana, 406 U.S. 715 (1972); In re H., 72 Misc.2d 59, 337 N.Y.S.2d 96[illegible] (1972); Panitch v. Wisconsin, 444 F. Supp. 32[illegible] (E.D. Wis. 1977); Mills v. Board of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972). At least one court has held specifically that handicapped persons constitute a "suspect class" entitled to strict scrutiny under the equal protection clause: In re G.H., 218 N.W.2d 441, 447 (N. Dak. 1974). Several other courts have indicated their willingness to make such a finding upon an appropriate showing. *See, e.g.,* Fialkowski v. Shapp, 405 F. Supp. 946, 958–59 (E.D. Pa. 1975); Lora v. Board of Educ. of N.Y, 456 F. Supp. 1211, 1275 (E.D. N.Y. 1978). *See also,* Note, "Mental Illness: A Suspect Classification?" *Yale L.J.,* vol. 83 (1974), p. 237; Marcia Pearce Burgdorf and Robert Burgdorf, Jr., "A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' under the Equal Protection Clause," *Santa Clara Lawyer,* vol. 15 (1975), pp. 899–910. But several other courts have expressly held that handicapped persons are not a suspect class. *See, e.g.,* Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency, 649 F.2d 71 (1st Cir. 1981); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1981), *cert. denied,* 455 U.S. 976 (1982).

[147] *See, e.g.,* Mills v. Board of Educ. of D.C., 348 F. Supp 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). *See also* Hendrick Hudson Cent. School Dist. v. Rowley, 102 S.Ct. 3034, 3043–44 (1982).

[148] *See, e.g.,* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) (right to treatment could have been found under equal protection clause).

[149] 406 U.S. 715 (1972).

[150] Boyd v. Board of Registrars of Voters, 368 Mass. 631, 334 N.E. 2d 629 (1975).

[151] Stoner v. Miller, 377 F. Supp. 177 (E.D. N.Y. 1974).

[152] *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970).

contest numerous governmental actions, including: challenges to commitment procedings for the mentally ill and mentally retarded;[153] placement, denials, or transfers concerning special education;[154] sterilization;[155] provision or denial of life-prolonging medical services;[156] and employment.[157]

Apart from its procedural protections, the due process clause has also been held to provide substantive rights. Advocates for mentally disabled persons have also argued for a right to treatment, training, or habilitation when the State has denied them their liberty. Recently, the U.S. Supreme Court in *Youngberg v. Romeo*[158] decided that those persons who have been involuntarily committed to mental retardation facilities have the right under the due process clause to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as may reasonably be required by these liberty interests. Before this ruling, numerous Federal court decisions held that when the State commits someone involuntarily to an institution on the promise of providing treatment, the State is constitutionally required by the due process clause to provide such treatment.[159]

The due process clause has also been construed to prohibit certain governmental classifications that exclude all persons with a particular disability from holding a particular job. In *Gurmankin v. Costanzo,*[160] the Philadelphia school district established an "irrebutable presumption" that Gurmankin's blindness rendered her incompetent to teach sighted students and refused her permission to take the qualifying examination despite the fact that she had fulfilled all other requirements. The Third Circuit held that by arbitrarily denying Gurmankin the right to take the examination, the board had violated her due process rights.[161] The continued validity of this due process theory may be limited, however, to situations where the rule or policy does not sufficiently relate to skills actually needed to perform the job in question.[162]

Finally, some statutes and ordinances affecting handicapped people have been successfully challenged under the due process clause as being too vague. Examples include ordinances restricting occu-

[153] Jackson v. Indiana, 406 U.S. 715 (1972).

[154] Mills v. Board of Educ. of D.C., 348 F. Supp 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); Hairston v. Drosick, 423 F. Supp. 180 (S.D. W.Va. 1976).

[155] *E.g.*, Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1973).

[156] *E.g.*, Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E. 2d 417, 432-435 (1977).

[157] *E.g.*, Bevan v. New York State Teachers' Retirement Sys., 74 Misc.2d 443, 345 N.Y.S.2d 921 (N.Y. Sup. Ct. 1973), *aff'd as modified,* 44 A.D.2d 163, 355 N.Y.S.2d 185 (N.Y. App. Div. 1974).

[158] 102 S.Ct. 2452 (1982).

[159] *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part and vacated and remanded in part,* 550 F.2d 1122 (8th Cir. 1974).

[160] 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd,* 556 F.2d 184 (3d. Cir. 1977).

[161] 556 F.2d at 188, *vacated on other grounds,* 626 F.2d 1115 (3d Cir. 1980), *cert. denied,* 450 U.S. 923 (1981). *See also* Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977).

[162] New York Transit Auth. v. Beazer, 440 U.S. 568, 592 & n. 38 (1979).

pancy in hotels and boarding and rooming houses,[163] statutes authorizing psychosurgery and shock therapy,[164] and statutes authorizing termination of parental rights.[165]

Although the constitutional mandates of equal protection and due process of law are limited, they provide a minimum foundation upon which Congress built by enacting the Rehabilitation Act of 1973, the Education for All Handicapped Children Act, the Developmental Disablities Assistance and Bill of Rights Act, and the Architectural Barriers Act of 1968. Taken together, these laws demonstrate a strong and consistent congressional purpose to end discrimination on the basis of handicap in employment, education, and all public services. Clearly, Congress sought to ensure that handicapped persons obtain adequate and effective training, education, and support services, enabling them to live in the most integrated and independent manner consistent with their own capabilities.

[163] Stoner v. Miller, 377 F. Supp. 177 (E.D. N.Y. 1974).

[164] Aden v. Younger, 57 Cal. App. 3d 662, 129 Cal. Rptr. 535, 543-45 (1976).

[165] Alsager v. District Court of Polk County, 406 F. Supp. 10 (D. Ia. 1975).

Chapter 4

The Goal of Full Participation

Society has been able to choose among distinct alternatives in the way it treats people with handicaps.[1] A seminal law review article, published in 1966, compared the custodial and integrative approaches:

> The older custodial attitude is typically expressed in policies of segregation and shelter, of special treatment and separate institutions. The newer integrative approach focuses attention upon the needs of the disabled as those of normal and ordinary people caught at a physical and social disadvantage. The effect of custodialism is to magnify physical differences into qualitative distinctions; the effect of integrationism is to maximize similarity, normality, and equality as between the disabled and the able-bodied.[2]

In contrast to custodialism, the integrative approach emphasizes handicapped people's "potential for full participation as equals in the social and economic life of the community."[3]

Government bodies at all levels of modern American society have, with relative consistency, chosen full participation[4] as the desired objective for handicapped people. Based on the understanding that handicapped people have a "basic human right of *full participation* in life and society,"[5] Congress has made the following findings:

> the benefits and fundamental rights of this society are often denied those

[1] For a discussion of the historical evolution of public policy toward handicapped persons, from indifference to segregation in residential institutions to income maintenance support to current policies of independence and integration, *see* Lloyd Burton, "Federal Government Assistance for Disabled Persons: Law and Policy in Uncertain Transition," *Law Reform in Disability Rights*, vol. 2 (1981), pp. B–3 to B–18.

[2] Jacobus ten Broek and Floyd Matson, "The Disabled and the Law of Welfare," *Calif. L. Rev.*, vol. 54 (1966), pp. 809, 816.

[3] Ibid., p. 815.

[4] *See, e.g.*, Note, "Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act," *N.Y.U. L. Rev.*, vol. 55 (November 1980), pp. 898–99.

[5] S. Rep. No. 1297, 93d Cong., 2d Sess. 56, *reprinted in* 1974 U.S. Code Cong. and Ad. News 6373, 6406 (emphasis added).

> individuals with mental and physical handicaps;. . .
>
> it is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps;. . .
>
> it is essential. . .that *the complete integration of all individuals with handicaps* into normal community living, working, and service patterns be held as *the final objective*. . . .[6]

In enacting and amending section 504 of the Rehabilitation Act of 1973, Congress "made a commitment to the handicapped, that, to the maximum extent possible they shall be *fully integrated* into the mainstream of life in America."[7]

Numerous State laws have reiterated the Federal objective of full participation or total integration of handicapped persons.[8] Courts have recognized this goal: "Both the state and federal governments now pursue the commendable goal of *total integration* of handicapped persons into the mainstream of society."[9]

[6] 29 U.S.C. §701 Note (1976).

[7] S. Rep. No. 890, 95th Cong., 2d Sess. 39 (1978) (emphasis added).

[8] Many State statutes adopt as a specific declaration of policy that the State "shall encourage and enable handicapped persons to *participate fully* in the social and economic life of the State." *E.g.*, Ala. Code §21-7-1 (1977); Cal. Gov. Code §19230, subd. (a); Colo. Rev. Stat. §24-34-801 (cum. supp. 1981); Ga. Code Ann. §30-3-1 (1982); Idaho Code §56-701 (1976); Ill. Ann. Stat. Ch. 23 §3362 (cum. supp. 1982); Iowa Code Ann. §601D.1 (West 1975); Me. Rev. Stats. Ann. Tit. 17 §1311 (1979); Md. Ann. Code Art. 30 §33 (cum. supp. 1981); N.C. Gen. Stat. §168-1 (1982); N.D. Cent. Code 25-13-01 (1978); S.C. Code §10-5-210 and §43-33-10 (1977); Tex. Human Resources Code Ann. Tit. 8 §121.0001 (1980); Va. Code §63.1-171.1 (1980) (emphasis added). Other States use slightly different language to the same effect. Oregon, for example, guarantees handicapped persons "the fullest possible participation in the social and economic life of the state." Or. Rev. Stat. §659.405 (1981). The District of Columbia recognizes the right of every individual to "have an equal opportunity to participate fully in the economic, cultural, and intellectual life of the District and to have an equal opportunity to participate in all aspects of life." D.C. Code Ann. §1-2511 (1981). Louisiana guarantees handicapped people "an equal opportunity to enjoy a full and productive life," La. Rev. Stat. Ann. Ch. 30 §2252 (1982), and "to secure an education, to find and maintain gainful employment, to live independently, and to otherwise participate fully in society." La. Rev. Stat. Ann. Ch. 8 §1731 (1982).

[9] In re Marriage of Carney, 157 Cal. Rptr. 383, 598 P.2d 36, 44 (1979) (emphasis added); *see also* Borden v. Rohr, no. C 2-75-844, Excerpts of Proceedings, Dec. 30, 1975 (S.D. Oh. 1975), *reported in* Robert Burgdorf, ed., *The Legal Rights of Handicapped Persons* (Baltimore: Brookes, 1980), pp. 1105-06 (hereafter cited as *Legal Rights of Handicapped Persons).* In a recent decision, the U.S. Supreme Court declared in regard to the Rehabilitation Act of 1973: "[T]hat statute confirms the federal interest in developing the opportunities for all individuals with handicaps to live full and independent lives." Community Television of Southern Cal. v. Gottfried, 103 S.Ct. 885, 892 (1983).

Such sentiments have been echoed on the international level by United Nations declarations. In 1975 the United Nations General Assembly adopted and proclaimed its Declaration on the Rights of Disabled Persons; Resolution 3447's goals include enabling handicapped people to "become as self-reliant as possible" and promoting measures that will "hasten the process of their social integration or reintegration." G.A. Res. 3447, 30 U.N. GAOR, Supp. (no. 34) 92, U.N. Doc. A/10034 (1975). In designating 1981 as the International Year of Disabled Persons, the General Assembly declared *"full participation and equality"* as the year's central theme. G.A. Res. 31/123, 31 U.N. GAOR Supp. (no. 39) 115, U.N. Doc. A/31/39 (1976) (emphasis added). In the United States, the concept of "full participation"

Setting this goal, of course, does not mandate the means of its accomplishment. The recurring phrases, "full participation" and "total integration," however, delineate the ultimate target toward which we may direct specific conduct, policies, and practices and against which we may measure progress.

The Costs and Benefits of Full Participation

There are a number of approaches that our society could have chosen in working with the handicapped people. For instance, it might have done nothing and adopted a Social Darwinist view of survival of the fittest.[10] Or it might have continued to pursue the custodial approach of sheltering and segregating. Another alternative might have been to guarantee each handicapped person a certain minimum level of service and opportunity to ensure a minimally adequate quality of life. Under such a scheme, each handicapped person might have been assured an appropriate "niche" in society, with rights, for instance, to a job, housing, essential medical treatment, and transportation. Or perhaps an even more extreme alternative would have been to provide handicapped people with all the resources, assistance, and restructuring necessary to permit them to pursue any activity, vocation, and way of life they chose.

Instead of these alternatives, our society has chosen to try to provide handicapped people fair and equal chances to participate fully in economic competition and in opportunities for education, housing, transportation, health care, and other services and benefits available to most people.

Few would argue against a general goal of increasing handicapped people's participation, particularly in situations where it can be pursued cheaply and easily. Where costs appear to be more substantial, however, specific programs for achieving full participation by prohibiting discrimination and providing essential services are sometimes questioned. Many such initiatives, particularly civil rights laws proscribing discrimination against handicapped people, can be justified as matters of simple equity and basic human rights to which cost should not be used as an excuse. Generally, the cost of eliminating discriminatory practices does not justify continuing to discriminate, although cost may be a legitimate factor in choosing among vari-

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was interpreted as meaning "mainstreaming the world's 400 million disabled persons into every aspect of society." Stuart Eizenstat, Counselor to President Carter, address to the U.S. Planning Council for the U.N. Year of Disabled Persons, Washington, D.C., June 29, 1979, quoted in Stanley S. Herr, "Rights of Disabled Persons: International Principles and American Experiences," *Colum. Human Rights L. Rev.*, vol. 12 (1980). Handicapped persons and their advocates have concurred in such statements of the societal goal: "*Total Integration* is the number one priority." Max Starkloff, testimony, hearing before the Architectural and Transportation Barriers Compliance Board, Chicago, Ill., June 9–10, 1975, quoted in U.S., Architectural and Transportation Barriers Compliance Board, *Freedom of Choice: Report to the President and Congress on Housing Needs of Handicapped Individuals* (1976), vol. 2, pp. 1–2 , also quoted with approval in Kent Hull, *The Rights of Physically Handicapped People* (New York: Avon Books, 1979), pp. 33–34 (emphasis added). Some business leaders have also advocated the goal of full participation. *See* Bob Gatty, "Business Finds Profit in Hiring the Disabled," *Nation's Business*, August 1981, pp. 30–31, quoting Xerox Corporation President David J. Kearns.

[10] *See* Garrity v. Gallen, 522 F. Supp. 171, 207 (D.N.H. 1981).

ous alternatives for remedying discrimination.

Some have argued, however, that accommodations to permit participation by handicapped persons may simply cost too much for society to undertake without financial detriment to other citizens.[11] A 1979 *New York Times* editorial voiced such concerns:

> Do the 30 million Americans afflicted with physical or mental handicaps have a right of access, no matter what the cost, to all publicly sponsored activities? That is now a central question because the price of such access for the disabled promises to become very great.[12]

Time magazine discussed the costs of implementing accommodation requirements and concluded: "Overzealous enforcement could drive well-meaning institutions to distraction, if not out of business, and thus handicap society as a whole."[13]

In response to such reservations concerning costs, the Congress and regulatory agencies have carefully considered the cost implications of nondiscrimination requirements and other government initiatives seeking to ensure fuller participation by handicapped people. Practical experience has shown that the costs of legally required accommodations to allow handicapped people's participation are often nominal.[14] Projected costs have frequently proven to be overestimated and contrary to common sense and practicality.[15] Moreover, the courts and regulators have indicated that there are limits on the extent to which accommodation is legally required.[16] Excessive cost and undue hardship may, in certain circumstances, be legitimate excuses for not making a change or modification to enhance the participation of a handicapped person. The U.S. Supreme Court has indicated that recipients of Federal financial assistance are not always required to make accommodations for handicapped people that involve undue financial burdens.[17] Federal regulations indicate that the costliness of making an accommodation in employment can amount to an undue hardship that excuses an employer from the obligation to render the accommodation.[18] Similarly, three Federal courts have ruled that public transportation systems receiving Federal financial assistance are not legally required to make modifications

[11] Henry Fairlie, "We're Overdoing Help For the Handicapped," *The Washington Post*, June 1, 1980, p. D-1; Steven V. Roberts, "Harder Times Make Social Spenders Hard Minded," *The New York Times*, Aug. 3, 1980, p. E-3; Timothy B. Clark, "Regulation Gone Amok: How Many Billions for Wheelchair Transit?" *AEI Journal on Government and Society/Regulation*, March-April 1980, p. 47.

[12] Editorial, "Must Every Bus Kneel to the Disabled?" *New York Times*, Nov. 18, 1979, p. 18-E, quoted in John S. Hicks, "Should Every Bus Kneel?" *Disabled People as Second-Class Citizens*, ed. Myron G. Eisenberg, Cynthia Griggins, and Richard Duval (New York: Springer Publishing Co., 1982).

[13] "Helping the Handicapped: Without Crippling Institutions," *Time*, Dec. 5, 1977, p. 34.

[14] See chap. 6 in the section entitled "What Is Reasonable Accommodation?"

[15] See examples discussed in the introduction to this monograph.

[16] See chap. 6 in the section entitled "Limitations Upon the Obligation to Accommodate."

[17] Southeastern Community College v. Davis, 442 U.S. 397, 412-13 (1979).

[18] 45 C.F.R. §84.12(c)(3) (1982); 41 C.F.R. §60-741.6(d) (1982).

that are too massive or too costly in order to allow participation of handicapped riders.[19] In addition, a Federal court of appeals has indicated that a legal requirement to provide an appropriate public education for each handicapped child is not an obligation to provide "the best education. . .money can buy."[20] Thus, as interpreted by the courts and regulators, full participation and nondiscrimination do not mean the unlimited expenditure of funds to assist handicapped people.

The costs of permitting handicapped people to participate are most apparent in times of scarce resources. The courts have indicated, however, that budget shortages and financial hardships should not be disproportionately borne by handicapped citizens. In *Mills v. Board of Education of the District of Columbia,*[21] a Federal court declared:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[22]

In *Board of Education of Hendrick Hudson Central School District v. Rowley,*[23] the U.S. Supreme Court quoted this language with approval as setting a "realistic standard."[24]

Any change from the status quo involves some costs. For social programs, it is appropriate to consider the long term, societal effects, rather than the short term costs of the program with regard to particular beneficiaries. When viewed in this broader perspective, the answer to concerns about the costs of full participation is that Congress, American business leaders, and other authorities have concluded that the costs of achieving full participation are more than offset by the resulting societal benefits.

From their inception, governmental programs for handicapped people have had interrelated economic and humanitarian purposes. The aim of early rehabilitation legislation—to enable handicapped people to go to work and contribute to the gross national product and the tax coffers—has remained a primary goal of subsequent legislative initiatives.[25] In 1963 President Kennedy significantly broadened the economic analysis of such programs when he cited long term dollar savings as a partial justification for his proposal of a comprehensive

[19] See Dopico v. Goldschmidt, 687 F.2d 644, 649–50 (2d Cir. 1982); American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272, 1278 (D.C. Cir. 1981); Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 607 (D.R.I. 1982).

[20] Hessler v. State Bd. of Educ. of Md., 700 F.2d 134, 139 (4th Cir. 1983).

[21] 348 F. Supp. 866 (D.D.C. 1972).

[22] *Id.* at 876.

[23] 102 S.Ct. 3034 (1982).

[24] *Id.* at 3044, n. 15.

[25] *See* S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in,* 1973 U.S. Code Cong. & Adm. News 2076, 2082–85.

program of facilities and programs to address mental illness and mental retardation. In a special message to Congress, the President noted the humanitarian values his proposal would further but also stressed statistical data to emphasize the economic waste resulting from previous governmental policies toward mental health and mental retardation.[26] Since then, in various contexts, the rationale of programs for handicapped people has included analysis of their economic benefits to society.[27]

The degree to which cost-benefit analysis[28] may be applied appropriately to governmental programs for handicapped people has been the subject of controversy.[29] Many authorities agree the analysis of financial costs and benefits is an important consideration in selecting the

[26] "Special Message to the Congress on Mental Illness and Mental Retardation," Feb. 5, 1963, *Public Papers of the Presidents: John F. Kennedy, 1963*, no. 50, pp. 126, 127.

[27] *See, e.g.*, Comptroller General of the United States, "Returning the Mentally Disabled to the Community: Government Needs to Do More," Jan. 7, 1977, pp. 5–6; S. Rep. No. 318, 93d Cong., 1st Sess. *reprinted in* 1973 U.S. Code Cong. and Adm. News 2085–86; U.S., Department of Housing and Urban Development, "A Cost-Benefit Analysis of Accessibility," undated; *Discrimination Against Handicapped Persons: The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance*, 41 Fed. Reg., app. B, 20,312 (1976); Congressional Budget Office, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches* (1979) p. 67; 119 Cong. Rec. 24,586 (1973) (statement of Sen. Cranston); H.R. Rep. 1149, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312, 7320; Note, "Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act," *N.Y.U. L. Rev.*, vol. 55 (1980), pp. 900–01; Note, "Mending the Rehabilitation Act of 1973," *U. Ill. L. Rev.*, vol. 1982 (1982), pp. 727–28; American Bar Association, *Eliminating Environmental Barriers* (1979), p. 2.

[28] Given initial impetus by the many large government expenditures on flood control and national defense projects, cost-benefit analysis is a systematic approach expressing in numerical terms the costs and benefits of a particular project or program over a period of time. It seeks to minimize subjective evaluations of programs by providing objective, quantifiable measurements that accurately reflect true value. *See generally* Alice Rivlin, *Systematic Thinking for Social Action* (Washington, D.C.: The Brookings Institution, 1971), pp. 56–63; E.J. Mishan, *Cost-Benefit Analysis* (New York: Praeger, 1976); Abdul Qayum, *Social Cost-Benefit Analysis* (Portland: The Ha Pi Press, 1978); Edward M. Gramlich, *Benefit-Cost Analysis of Government Programs* (Englewood Cliffs, N.J.: Prentice-Hall, 1981). Pursuant to Executive Order 11291, major Federal regulations must be analyzed to assess their costs and benefits, and unless otherwise required by law, the most cost-effective alternative must be chosen. *See* Comptroller General of the United States, *Improved Quality, Adequate Resources, and Consistent Oversight Needed If Regulatory Analysis Is to Help Control Costs and Regulations* (1982), p. 1 (hereafter cited as GAO Report on Regulatory Analysis to Control Costs).

[29] *E.g.*, Note, "Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act," *N.Y.U. L. Rev.*, vol. 55 (November 1980), p. 901, n. 101; Note, "Mending the Rehabilitation Act of 1973," *U. Ill. L. Rev.*, vol. 1982 (1982), pp. 727–28; Elliott Krause, "Social Crisis and the Future of the Disabled," in *Disabled People as Second-Class Citizens*, pp. 276, 287–88; Lloyd Burton, "On Computing the Cost of Freedom," *Disability Rights Review*, vol. 1 (3) (March 1982), pp. 4–5; Leopold D. Lippman, *Attitudes Toward the Handicapped* (Springfield, Ill.: Charles C. Thomas Publisher, 1972), pp. 100–02; President's Committee on Mental Retardation, "A New Approach to Decision-Making in Human Management Services," *Changing Patterns in Residential Services for the Mentally Retarded*, ed. Robert B. Kugel and Wolf Wolfensberger (Washington, D.C.: 1969), pp. 369–72 (hereafter cited as "A New Approach to Decision-Making").

most efficient alternative among several choices for reaching a particular goal.[30] It is not so clear, however, that using cost-benefit analysis to select societal goals or evaluate social programs is appropriate. Cost-benefit analysis strongly favors quantifiable data, usually dollars and cents, on the theory that marketplace prices, fixed by supply and demand, are more reliable than subjective value judgments. Many social programs exist, however, because the marketplace does not adequately provide needed public services or because it is unfairly biased.

In such circumstances, the methodological premises or applications of cost-benefit analysis may encounter difficulty. Some authorities suggest the analysis of financial costs and benefits is appropriate only for evaluating the efficiency of various approaches for reaching a selected goal.[31] Since Congress has determined, as a matter of national policy, that handicapped persons are entitled as human beings to the opportunity of full participation in our society, economic factors should be considered only in determining how, and not whether, to pursue that goal. Moreover, most authorities seem to agree that financial data cannot adequately illustrate the societal value of programs without accounting for less easily quantifiable effects such as psychological, aesthetic, and humanitarian benefits.[32]

Nonetheless, numerous authorities have argued that economic advantages to society support the objective of handicapped people's full participation.[33] There is substantial evidence that the full participation approach renders significant economic benefits. In particular, governmental efforts to promote full participation for handicapped people in the areas of rehabilitation, employment, education, residential programs, and the elimination of environmental barriers

[30] *See, e.g.*, Qayum, *Social Cost Benefit Analysis*, pp. 9–10; Rivlin, *Systematic Thinking for Social Action*, pp. 56–60; GAO Report on Regulatory Analysis to Control Costs, pp. 12–13; Congressional Budget Office, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches*, pp. 3–5; Wolfensberger, "A New Approach to Decision-Making," p. 371; HUD Cost-Benefit Analysis, p. 4.

[31] *E.g.*, Rivlin, *Systematic Thinking for Social Action*, pp. 56–60; Gerben DeJong and Raymond Lifchez, "Physical Disability and Public Policy," *Scientific American*, vol. 248, no. 6 (June 1983), p. 49; Burton, "On Computing the Cost of Freedom," *Disability Rights Review*, March 1982, pp. 4–5; CBO, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches*, p. 4; HUD Cost-Benefit Analysis, p. 4; Qayum, *Social Cost Benefit Analysis*, pp. 102–05. *Cf.* Mishan, *Cost-Benefit Analysis*, pp. 382–89.

[32] *E.g.*, Rivlin, *Systematic Thinking for Social Action*, pp. 59–60; GAO Report on Regulatory Analysis to Control Costs, p. 11; A.B.A., *Eliminating Environmental Barriers*, p. 2; Burton, "On Computing the Cost of Freedom," pp. 4–5; Qayum, *Social Cost Benefit Analysis*, pp. 80–106.

[33] *See, e.g.*, Paul G. Hearne, statement, in *Civil Rights Issues of Handicapped Americans: Public Policy Implications*, consultation before the U.S. Commission on Civil Rights, Washington, D.C., May 13–14, 1980, pp. 198, 199–01 (hereafter cited as Hearne statement, *Consultation);* "Mending the Rehabilitation Act," pp. 727–28; Frank Bowe, *Rehabilitating America: Towards Independence for Disabled and Elderly People* (New York: Harper & Row, 1980); A.B.A., *Eliminating Environmental Barriers*, p. 2; H.R. Rep. 1149, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312, 7320; 119 Cong. Rec. S. 3320–21 (1972) (statement of Sen. Williams); Costs, Benefits and Inflationary Impact of Section 504, 41 Fed. Reg. 20364–65 (1976). *See also* "Remarks at the Annual Meeting of the President's Committee on Employment of the Handicapped," May 1, 1980. *Public Papers of the Presidents: Jimmy Carter, 1980*, pp. 808, 812.

have been advocated on economic grounds.

Rehabilitation

In signing the Rehabilitation Act of 1973, President Nixon described the rehabilitation program as having long been one of the most successful of all Federal grant activities.[34] Numerous studies document the success of vocational rehabilitation programs in providing training to enable handicapped people to achieve independence.[35] These studies find very high benefit-to-cost ratios, ranging from a low of 2 to 1 to as high as 86 to 1.[36] A 1978 House report declared:

> [S]everal cost-benefit analyses of the rehabilitation program have been conducted and although these analyses differ with respect to methods and assumptions, they all agree on one crucial fact—the benefits of the rehabilitation program are many times its costs. . . .
>
> The total annual earnings of 303,328 individuals rehabilitated in fiscal year 1976 are estimated at $1.347 billion—or a net increase of $1.101 billion over the earnings of these individuals at the time they entered the rehabilitation system.
>
> In addition to the annual earnings that rehabilitated individuals contribute to the GNP, the Rehabilitation Services Administration estimates that individuals, as a minimum, will be contributing approximately 6 percent of their total income to Federal, state and local governments in taxes. This contribution is, of course, in addition to the estimated savings to the government through the removal of clients from the public assistance roles, by reducing the dependency of clients or the removal of clients from institutions.[37]

Based solely on the increase in earnings due to vocational rehabilitation efforts, these economic advantages do not include such unquantifiable benefits as the psychological well-being of clients and their families.

Employment

Similar economic benefits have been attributed to government programs prohibiting handicap discrimination in employment. As chapter 2 noted, disproportionately fewer handicapped people than

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[34] "Statement on Signing the Rehabilitation Act of 1973," Sept. 23, 1973, *Public Papers of the Presidents: Richard Nixon, 1973,* no. 274, p. 823.

[35] *See* Sar A. Levitan and Robert Taggart, *Jobs for the Disabled* (Baltimore: Johns Hopkins Univ. Press, 1977), pp. 77–78; Richard V. Burkhauser and Robert H. Haveman, *Disability and Work: The Economics of American Policy* (Baltimore: Johns Hopkins Univ. Press, 1982), pp. 67–70, and authorities cited therein.

[36] Levitan and Taggart, *Jobs for the Disabled,* pp. 77–78.

[37] H.R. Rep. No. 1149, 95th Cong., 2d Sess. 8–9 *reprinted in* 1978 U.S. Code Cong. & Adm. News 7319–20.

nonhandicapped people have jobs.[38] Discrimination also results in lower earnings for handicapped employees. Studies have shown that a substantial portion of the difference in the wages of handicapped and nonhandicapped workers is due to labor market discrimination.[39] One study commissioned by the Department of Health, Education, and Welfare's Office for Civil Rights estimated that eliminating discrimination against handicapped people in HEW-funded grant programs would yield $1 billion annually in increased employment and earnings for handicapped people.[40] In addition to increasing the gross national product, it has been estimated that such an earnings increase by handicapped workers would result in some $58 million in additional tax revenues to Federal, State, and local governments.[41] Statistics indicate that funds generated by eliminating handicap discrimination would return more than 3 dollars for every dollar spent.[42]

Education

The costs and benefits of education programs for handicapped children have been closely scrutinized. A popular concern has been whether the costs involved in educating handicapped children are justified, particularly in times of budgetary constraints. One school district superintendent stated that educating handicapped children involves "fantastic costs" and that if such special education were provided, "other programs [would] suffer."[43] Although the data are sketchy, the costs of educating a handicapped child clearly exceed, on the average, the cost of educating a nonhandicapped

[38] Hiring of handicapped workers does not appear to pose a serious threat of displacing nonhandicapped workers. Handicapped people share with minorities and women the problem of being the first subjected to layoffs in times of economic slowdowns. In the current recession, for example, unemployment among handicapped persons has risen from a prerecession rate of 45 percent to a present estimated rate of 50–75 percent. President's Committee on Employment of the Handicapped estimates quoted in *Handicapped Rights and Regulations,* Apr. 5, 1983, p. 49.

[39] *See* William G. Johnson and James Lambrinos, "Employment Discrimination," *Society,* vol. 20, no. 3 (March–April 1983), p. 48; Barbara L. Wolfe, "How the Disabled Fare in the Labor Market," *Monthly Labor Review,* vol. 103, no. 9 (September 1980), pp. 51–52.

[40] *Discrimination Against Handicapped Persons: The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance,* 41 Fed. Reg. 20,232 (1976). *See,* Note, "Mending the Rehabilitation Act of 1973," p. 727.

[41] S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2086; 119 Cong. Rec. 24,586 (1973) (statement of Sen. Cranston). These 1973 estimates were based upon a minimum 5 percent of income tax rate. By 1978 the estimated rate had already risen to 6 percent. *See* H.R. Rep. No. 1149, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 7320.

[42] 119 Cong. Rec. 24,586 (1973) (statement of Sen. Cranston); *see also,* Note, "Mending the Rehabilitation Act," pp. 727–28.

[43] Steven V. Roberts, "Harder Times Make Social Spenders Hard Minded," *The New York Times,* Aug. 3, 1980, p. E–3, quoting District of Columbia School Superintendent Vincent E. Reed; *see also* 121 Cong. Rec. 25537 (July 29, 1975) (remarks of Rep. Bauman).

child.[44] The Education for All Handicapped Children Act (EAHCA) uses the term "excess costs" to describe the additional costs involved in educating handicapped pupils.[45] The portion of such expenses underwritten by the Federal Government has risen substantially in recent years, but State and local governments continue to bear the bulk of these costs.[46] Some commentators have suggested that the mandates imposed upon State and local education agencies by Federal programs such as the EAHCA are disproportionate to the relatively low levels of Federal funding provided.[47]

Since the enactment of the EAHCA, however, the paramount necessity of providing a free appropriate public education for each handicapped child is rarely questioned.[48] Congress and other

[44] The U.S. Department of Education has observed:

> No one knows for certain how much special education programming costs. While many reasons exist for this uncertainty, a primary factor is that education agencies seldom use accounting procedures that are based on particular types of handicapped children or unique instructional programs. Thus, costs involved in providing for such matters as personnel, services, and transportation for handicapped students are comingled with budget line categories for nonhandicapped students.

U.S., Department of Education, *To Assure the Free Appropriate Public Education of All Handicapped Children: Fourth Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act* (1982), p. 12 (hereafter cited as *1982 P.L. 94-142 Implementation Report).*

While EAHCA was being debated, some congressional leaders made reference to rough estimates that educating a handicapped child costs an average of twice as much as a nonhandicapped child. *See* 121 Cong. Rec. 25536 (1975) (remarks of Rep. Perkins); 121 Cong. Rec. 23703 (1975) (remarks of Rep. Brademas). A Rand Corporation study estimated that special education costs 2.17 times the cost of regular eduction. J.S. Kakalik and others, *The Cost of Special Education: Summary of Study Findings,* performed under contract with the U.S. Department of Education (Santa Monica, Calif.: Rand Corporation, 1981), p. 39. The accuracy and usefulness of such overall estimates are somewhat dubious, since special education costs vary dramatically from State to State, from rural to urban settings, from handicap to handicap, from school district to school district, and depend upon the level of supportive and professional services made available. *See* U.S., Department of Education, *To Assure the Free Appropriate Public Education of All Handicapped Children: Fifth Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act* (1973), p. 16 (hereafter cited as *1983 P.L. 94-142 Implementation Report);* Leigh S. Marriner, "The Cost of Educating Handicapped Pupils in New York City," *Journal of Education Finance,* vol. 3 (Summer 1977), pp. 82-97; Lloyd E. Frohreich, "Costing Programs for Exceptional Children: Dimensions and Indices," *Exceptional Children,* vol. 39 (1973), pp. 517-24; Richard A. Rossmiller and Lloyd E. Frohreich, "Expenditures and Funding Patterns in Idaho's Programs for Exceptional Children" (Madison, Wisc.: March 1979), pp. 1-7.

[45] 20 U.S.C. §1401(20) (Supp. V 1981).

[46] In 1977 grants awarded under EAHCA totaled $200 million out of an estimated total of over $7 billion in national expenditures for excess costs of special education. *1983 P.L. 94-142 Implementation Report,* pp. 16, 169. As of the fiscal year ending in September 1983, Federal grants under EAHCA will total over $930 million. Ibid., p. 169.

[47] *See* Robert B. Howsam, "Public Education: A System to Meet Its Needs," *Policy Studies Review,* vol. 2, no. 1 (January 1983), p. 102; Laurence E. Lynn, Jr., "The Emerging System for Educating Handicapped Children," *Policy Studies Review,* vol. 2, no. 1 (January 1983), p. 50; Richard A. Rossmiller, "Funding and Entitlement Under P.L. 94-142," *Perspectives on the Implementation of the "Education for All Handicapped Children Act of 1975,"* ed. Richard A. Johnson and Anthony P. Kowalski (Washington, D.C.: The Council of the Great City Schools, 1977), p. 30.

[48] Apart from EAHCA, a duty to provide handicapped children a free appropriate public educa-

commentators have concluded that expending funds for educating handicapped children is a sound economic investment. In enacting the act,[49] Congress thoroughly explored the costs of special education. It studied such issues as the degree of additional expense required for educating a handicapped student,[50] the costs of procedural requirements,[51] and the apportioning of Federal and State responsibility for underwriting such costs.[52] Congress also considered funding formulas for Federal reimbursement,[53] authorization levels and future funding expectations,[54] and the effect of economic hard times and budgetary constraints.[55] In addition, Congress repeatedly stressed the fiscal benefits accruing from such educational programs.[56] Numerous members of Congress expressed their conviction that funds expended to educate handicapped youngsters would be outweighed by the financial returns such education would produce.[57] The Senate report accompanying the act decried the billions of dollars spent to provide some handicapped people maintenance in a dependent and minimally adequate lifestyle, and concluded:

> With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such ser-

tion has been held to exist under other Federal statutes, Federal constitutional provisions, State constitutions, and State statutes. *See, e.g.*, New Mexico Ass'n for Retarded Citizens v. State of N.M., 678 F.2d 847, 853–55 (10th Cir. 1982); Mills v. Board of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972); In re G.H., 218 N.W.2d 441 (N.D. 1974); Lora v. Board of Educ. of City of N.Y., 456 F. Supp. 1211, 1216–24, 1230–64 (E.D.N.Y. 1978); Frederick L. v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976).

[49] Pub. L. No. 94-42, 89 Stat. 773 (1975), 20 U.S.C. §1401 *et seq.*

[50] *See* 121 Cong. Rec. 23706–07 (1975) (remarks of Rep. Quie); 121 Cong. Rec. 25534 (1975) (remarks of Rep. Brademas); 121 Cong. Rec. 25536 (1975) (remarks of Rep. Perkins).

[51] 121 Cong. Rec. 19499 (1975) (remarks of Sen. Dole).

[52] *See* 121 Cong. Rec. 19494 (1975) (remarks of Sen. Javits); 121 Cong. Rec. 19498 (1975) (remarks of Sen. Dole); 121 Cong. Rec. 19502–03 (1975) (remarks of Sen. Cranston); 121 Cong. Rec. 23702 (1975) (remarks of Rep. Brademas); 121 Cong. Rec. 23705 (1973) (remarks of Rep. Jeffords); 121 Cong. Rec. 37410 (1975) (remarks of Sen. Randolph).

[53] *See* 121 Cong. Rec. 19494 (1975) (remarks of Sen. Javits); 121 Cong. Rec. 23703–04 (1975) (remarks of Rep. Brademas); 121 Cong. Rec. 23706 (1975) (remarks of Rep. Perkins); 121 Cong. Rec. 23709 (1975) (remarks of Rep. Biaggi).

[54] *See* 121 Cong. Rec. 23707 (1975) (remarks of Rep. Quie); 121 Cong. Rec. 25534 (1975) (remarks of Rep. Brademas); 121 Cong. Rec. 37025–26 (1975) (remarks of Rep. Perkins); 121 Cong. Rec. 37030 (1975) (remarks of Rep. Daniels); 121 Cong. Rec. 37413 (1975) (remarks of Sen. Williams).

[55] *See* 121 Cong. Rec. 37413 (1975) (remarks of Sen. Williams); 121 Cong. Rec. 25537 (1975) (remarks of Rep. Bauman); 121 Cong. Rec. 37029 (1975) (remarks of Rep. Michel).

[56] *See* 121 Cong. Rec. 37420 (1975) (remarks of Sen. Hathaway); 121 Cong. Rec. 37411 (1975) (remarks of Sen. Humphrey); 121 Cong. Rec. 25538 (1975) (remarks of Rep. Harris); 121 Cong. Rec. 25541 (1975) (remarks of Rep. Harkin); 121 Cong. Rec. 37418 (1975) (remarks of Sen. Biden); 121 Cong. Rec. 23709 (1975) (remarks of Rep. Minish); 121 Cong. Rec. 23703 (1975) (remarks of Rep. Brademas).

[57] *See* 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams); 121 Cong. Rec. 19505 (1975) (remarks of Sen. Beall); 121 Cong. Rec. 25538 (1975) (remarks of Rep. Harris); 121 Cong. Rec. 25541 (1975) (remarks of Rep. Harkin); 121 Cong. Rec. 37030 (1975) (remarks of Rep. Daniels); 121 Cong. Rec. 37411 (1975) (remarks of Sen. Humphrey); 121 Cong. Rec. 37417 (1975) (remarks of Sen. Javits); 121 Cong. Rec. 37418 (1975) (remarks of Sen. Biden); 121 Cong. Rec. 37420 (1975) (remarks of Sen. Hathaway).

> vices, would increase their independence, thus reducing their dependence on society. . . .
>
> Providing educational services will ensure against persons needlessly being forced into institutional settings.[58]

In 1976 the Department of Health, Education, and Welfare estimated that expansion of special education services pursuant to the requirements of section 504 of the Rehabilitation Act would result in an annual increase of $1.5 billion in adulthood earnings of the additional handicapped children served.[59]

Moreover, it estimated placements in settings closer to the mainstream and reduced mislabeling of nonhandicapped children would save some $800 million per year in special education expenditures.[60] A 1982 report to Congress by the U.S. Department of Education indicates that under the Education for All Handicapped Children Act, more than 67 percent of handicapped children were attending regular classes[61] and more than 93 percent were being educated in regular education buildings.[62] The report cited a study indicating that under the EAHCA there had been a reduction in costly private placements.[63] The few studies on the issue indicate that special education yields substantial economic benefits by reducing the need for institutionalization, increasing future earnings, and decreasing need for public assistance.[64]

Institutionalization

Virtually all the relevant literature documents that segregating handicapped people in large, impersonal institutions is the most expensive means of care.[65] Evidence suggests that alternative living arrangements allowing institutionalized residents to return to the community can save money.[66] As a Federal court has noted, "Comparable facilities in the com-

[58] S. Rep. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1433.

[59] *Discrimination Against Handicapped Persons: The Costs, Benefits and Inflationary Impacts of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance*, 41 Fed. Reg. 20365 (1976).

[60] *Id.* at 20364.

[61] *P.L. 94-142 Implementation Report*, p. 6, fig. 2.

[62] Ibid.

[63] Ibid., p. xvii.

[64] *E.g.*, Ronald Conley, *The Economics of Mental Retardation* (Baltimore: Johns Hopkins Univ. Press, 1973), pp. 296-300; L.J. Schweinhart and D.P. Weikart, "Young Children Grow Up: The Effects of the Perry Preschool Program on Youths Through Age 15" (Ypsilanti, Minn.: High Scope Educational Research Foundation, 1980). *See also* Discrimination Against Handicapped Persons Cost Study, 41 Fed. Reg. 20312, 20338-60 (1976); Note, "Mending the Rehabilitation Act of 1973," p. 728; Note, "The Education for All Handicapped Children Act: Opening the Schoolhouse Door," *N.Y.U. Rev. L. & Soc. Change*, vol. 6 (1976), p. 63.

[65] Comptroller General of the United States, *Returning the Mentally Disabled to the Community: Government Needs to Do More* (1977), pp. 5-7; Conley, *The Economics of Mental Retardation*, pp. 297-300; Jane G. Murphy and William E. Datel, "A Cost-Benefit Analysis of Community Versus Institutional Living," *Hospital and Community Psychiatry*, vol. 27, no. 3 (March 1976), pp. 165-70.

[66] A demonstration project to develop alternatives to institutional litigation estimated that $20,000 could be saved for each deinstitutionalized person over a 10-year period. *See* Jane G. Murphy and William E. Datel, "A Cost-Benefit Analysis of Community Versus Institutional Living," *Hospital and Community Psychiatry*, vol. 27, no. 3 (March 1976), pp. 165-69.

munity are generally less expensive than large isolated state institutions."[67]

Transportation

The costs of eliminating barriers preventing use of public transportation by handicapped people are not small, but the benefits to society may be substantial.[68] Estimates by the Congressional Budget Office (CBO) of costs of removing transportational barriers in federally funded transit systems range from $4.4 billion to $6.8 billion.[69] A study by the American Public Transit Association estimated the total cost per rider of accessible fixed route bus service to be $717.[70] This estimate was based on an average estimated cost of five transportation systems, ranging from $59 per handicapped bus rider in San Diego to $1,440 per handicapped passenger in Milwaukee.[71] Some have suggested that high costs make accessible transportation infeasible.[72] One authority has contended that rules requiring accessible transportation for handicapped people "are so costly, and of benefit to such an infinitesimal minority of handicapped people, that they call into question the wisdom of the law and the common sense of those who administer it."[73]

The accuracy of high cost estimates of accessible transportation has been the subject of much controversy.[74] Figures have been criticized as underestimating potential handicapped ridership, overes-

[67] Halderman v. Pennhurst State School and Hosp., 446 F. Supp. 1295, 1312 (E.D. Pa. 1978), *reversed on other grounds*, 451 U.S. 1 (1981). *See also* Note, "Mending the Rehabilitation Act of 1973," p. 728; 118 Cong. Rec. 3321 (1972) (statement of Sen. Williams).

[68] American Bar Association, *Eliminating Environmental Barriers* (1979), p. 2.

[69] These estimates vary according to which of three basic options is being considered for serving the transportation needs of handicapped people. The first option, the transit plan, would cost $6.8 billion to be spent over the next 30 years. Of this amount $2.2 billion would be spent on modifying, operating, and maintaining rail services. This $2.2 billion would also include the cost of providing door-to-door service in lieu of modifying stations and rail cars. The remaining $4.6 billion would be spent on modifying, purchasing, and maintaining transit buses. The second option, the taxi plan, would cost an estimated $4.4 billion over the next 30 years. This plan would entail a number of small modifications in existing rail and bus systems. The emphasis, however, would be on providing dial-a-ride vans for handicapped persons. The third option, the auto plan, would cost an estimated $6.4 billion over the next 30 years. This plan would provide dial-a-ride service, low-fare taxi services for severely handicapped persons unable to use transit, and financial assistance to purchase specially equipped vans for permanently handicapped people who use wheelchairs. *See* CBO, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches*, pp. xi-xiv. The second and third plans would involve ongoing funding for the alternative transportation services in perpetuity, while the first would impose primarily one-time modification costs spread over 30 years.

[70] American Public Transit Association, "Brief Review of Mobility Options in Bus Transportation," June 1980, p. 4.

[71] Ibid.

[72] *See* Editorial, "Must Every Bus Kneel to the Disabled?" *New York Times*, Nov. 18, 1979, p. 18-E; Timothy B. Clark, "Regulation Gone Amok: How Many Billions for Wheelchair Transit?" *AEI Journal on Government and Society/Regulation*, March-April 1980, p. 47.

[73] Clark, "Regulation Gone Amok," p. 42.

[74] *See* Note, "Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act," pp. 901-02, n. 107; 126 Cong. Rec. S8151 (daily ed. June 25, 1980) (remarks of Sen. Exon); 126 Cong. Rec. H11609 (daily ed. Dec. 2, 1980) (remarks of Rep. Howard); CBO, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches*, p. 67; 126 Cong. Rec. S8151 (daily ed. June 25, 1980); 126 Cong. Rec. S7673 (daily ed. June 25, 1980) (remarks of Sen. Cranston).

timating capital and maintenance expenses, miscategorizing capital expenditure costs not included in computing per rider costs for nonhandicapped persons, and inappropriately comparing one-time expenditures with perpetually ongoing expenses of certain transit options.[75] Congressional Budget Office estimates of transportation accessibility costs, for example, have been strongly challenged by the Department of Transportation (DOT).[76] DOT argues that CBO figures underestimate numbers of potential handicapped passengers and overestimate maintenance costs, loss of seating capacity, and other expenses.[77] DOT concludes that, based on more realistic figures, the accessible fixed route service is actually less expensive than other alternatives.[78]

Whatever the actual costs of accessible transportation may be, there are clearly some significant benefits associated with it. Beyond interfering with handicapped people's ability to engage in social, recreational, housing, and educational opportunities available to nonhandicapped people, transportation barriers have a serious negative effect on employment opportunities.[79] One commentator has estimated that 13 percent of unemployment among handicapped people is due to travel barriers and that 200,000 handicapped people would enter the work force if the barriers were eliminated, adding as much as $1 billion in annual earnings to the economy.[80] The Department of Transportation has estimated that approximately $800 million in net benefits to society would result from eliminating transportation barriers.[81] DOT has observed that savings in reductions of supplemental security income costs by increased employment opportunities for handicapped people through accessible transportation would alone account for as much as $276 million annual savings for the Federal treasury.[82] Recent Federal court decisions indicate that although "massive" modifications may not be required, federally funded public transportation systems are

[75] *See, e.g.*, Dennis Cannon and Frances Rainbow, "Full Mobility: Counting the Costs of the Alternatives" (Washington, D.C.: American Coalition of Citizens with Disabilities, 1980); 126 Cong. Rec. S7673-75 (daily ed. June 20, 1980) (remarks of Sen. Cranston); 126 Cong. Rec. S8155-56 (daily ed. June 25, 1980) (remarks of Sen. Cranston); 126 Cong. Rec. H11623 (daily ed. Dec. 2, 1980) (remarks of Rep. Simon); 126 Cong. Rec. H11624-26 (daily ed. Dec. 2, 1980) (remarks of Rep. Miller).

[76] U.S., Department of Transportation, "Comments on Congressional Budget Office Report on Urban Transportation for Handicapped Persons," 126 Cong. Rec. S7673-75 (daily ed. June 20, 1980).

[77] Ibid., p. S7674.

[78] Ibid.

[79] See discussion of barriers in chap. 2. A Federal court has noted: "Transportation furnishes the vital link which enables the handicapped to obtain access to jobs, education, medical care, recreation and the other activities of modern living." Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 595 (D.R.I. 1982).

[80] N. Reed, "Equal Access to Mass Transportation for the Handicapped," *Transp. L.J.*, vol. 9 (1977), pp. 170-71, n. 24. *Cf.* CBO, *Urban Transportation for Handicapped Persons: Alternative Federal Approaches*, p. 21.

[81] N. Reed, *Equal Access to Mass Transportation for the Handicapped*, p. 171.

[82] U.S., Department of Transportation, (draft) "Environmental Impact Statement Pursuant to Section 102(2)(c), P.L. 91-190: The Department of Transportation's Regulation Implementing Section 504 of the Rehabilitation Act of 1973," June 1980, p. viii-12.

obliged to make efforts to accommodate the needs of handicapped passengers.[83]

Architectural Barriers

Making buildings accessible also appears to be economically beneficial. For new buildings, the cost of barrier-free construction is negligible, accounting for only an estimated one-tenth to one-half of 1 percent of construction costs.[84] For modifications to existing buildings, the costs are higher. Such costs vary greatly, but the Architectural and Transportation Barriers Compliance Board has estimated that full accessibility costs an average of 3 percent of a building's value.[85] One study of the costs of removing architectural barriers from existing buildings found the resulting economic benefits ranged from seven times to several thousand times the size of the costs.[86]

Based on such considerations regarding the various cost issues affecting handicapped people, a number of authorities[87] contend that although the costs of integrating handicapped people into the mainstream of society may be substantial in some contexts, they are more than offset by the benefits that accrue to society.[88] This conclusion is reached even when nonpecuniary rewards such

[83] *See* Dopico v. Goldschmidt, 687 F.2d 644, 650 (2d Cir. 1982); Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 608 (D.R.I. 1982). *Cf.* American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981). These decisions are reviewed in chap. 6.

[84] *Discrimination Against Handicapped Persons: The Costs, Benefits and Inflationary Impacts of Implementing Section 504 of the Rehabilitation Act of 1973,* 41 Fed. Reg. 20333; Comptroller General of the United States, *Further Action Needed to Make All Public Buildings Accessible to the Physically Handicapped* (1975), p. 89; "ATBCB Minimum Guidelines and Requirements—Cost Information," drafted for Office of Management and Budget by Architectural and Transportation Barriers Compliance Board, Mar. 20, 1981, p. 5 (hereafter cited as ATBCB Report).

[85] ATBCB Report, p. 5. Projection of costs of accessibility are frequently significantly overestimated. See Jack R. Ellner and Henry E. Bender, *Hiring the Handicapped* (New York: Amacom, 1980), pp. 48–49; Rolf M. Wulfsberg and Richard J. Petersen, *The Impact of Section 504 of the Rehabilitation Act of 1973 on American Colleges and Universities,* Technical Report of the National Center for Education Statistics (Washington, D.C.: Government Printing Office, 1979), p. 57.

[86] U.S., Department of Housing and Urban Development, Office of Policy Development and Research, *A Cost-Benefit Analysis of Accessibility,* by Deborah J. Chollet (Washington, D.C.: Government Printing Office, 1979), p. 3. One source estimates that 1.7 to 11.6 percent of the U.S. population would benefit from the elimination of architectural barriers. U.S., Department of Housing and Urban Development, Office of Policy Development and Research, *Access to the Built Environment, A Review of Literature* (1979). Another authority estimates that environmental barriers cost society more than $100 billion per year and that these costs are escalating rapidly. Bowe, *Rehabilitating America,* p. 93.

[87] *See, e.g.,* Hearne statement, *Consultation,* pp. 198–201; "Mending The Rehabilitation Act," pp. 727–28; Bowe, *Rehabilitating America,* p. 93; American Bar Association, *Eliminating Environmental Barriers,* p. 2; H.R. Rep. 1149, 95th Cong., 2d. Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312, 7320; 118 Cong. Rec. 3320–21 (1972) (statement of Sen. Williams); Costs, Benefits and Inflationary Impact of Section 504, 41 Fed. Reg. 20364–65 (1976). *See also* "Remarks at the Annual Meeting of the President's Committee on Employment of the Handicapped," May 1, 1980. *Public Papers of the Presidents: Jimmy Carter, 1980,* pp. 808, 812.

[88] Among the financial returns to which such authorities point are large savings in reduced expenditures of public benefits programs, such as social security disability insurance, supplemental security income (SSI), and State welfare, home relief, and aid to families with dependent children. Hearne statement, *Consultation,* p. 200; Bowe, *Rehabilitating America,* p. 4. This does not imply that handicapped recipients of such public benefits are not qualified or deserving of such

as psychological benefits, fairness, and humanitarian concerns are not considered. As one author succinctly concluded, "Keeping disabled people ... dependency is costing us many times more than would helping them to independence."[88]

The Meaning of Full Participation

Attaining the full participation of handicapped persons requires efforts by the public and private sectors in the broad areas of conduct, attitudes, and services. Government's role in ending discriminatory conduct consists primarily of enacting and enforcing laws against discrimination and providing tax benefits and other incentives for nondiscrimination. The role of individuals and organizations lies in voluntary efforts to avoid discriminating against those with handicaps. Countering negative attitudes toward handicapped people calls for education through public and private dissemination of positive information as well as increased interaction between handicapped and nonhandicapped people.

Services are also crucial to furthering the full participation of handicapped people. Eliminating discriminatory acts and hostile attitudes is only half the battle for those who cannot get out of bed and dress without attendant services; for those who need but do not have prosthetic devices, wheelchairs, or other equipment; for those without access to essential medical, psychological, or psychiatric services; and for those without needed transportation. To realize the goal of full participation, society needs to find ways to make necessary services available to handicapped people.

In combating discriminatory conduct, improving attitudes, and increasing the availability of essential services, the goal of full participation serves as the touchstone for choosing among alternative courses of action. The decision whether to place a special education class in a regular school building or in a separate school, for example, should take into account the degree to which each alternative fosters full participation. Choices among various public transportation options should also reflect the full participation goal. Public education and information programs should illustrate the benefits and importance of full participation by handicapped persons. Attendant services; prosthetic devices and equip-

benefits, but rather that increased expenditures to programs encouraging full economic and social participation by handicapped people would promote their economic self-sufficiency and reduce their need to rely on public benefits. Studies suggest that because of the way public benefits programs have been structured and administered, some have involved financial disincentives to full, competitive employment of handicapped persons. *See, e.g.*, Bonnie Sims and Scott Manley, "Keeping the Disabled Out of the Employment Market: Financial Disincentives," *Disabled People as Second-Class Citizens*, ed. Myron Eisenberg, Cynthia Griggins, and Richard Duval (New York: Springer Publishing Co., 1982), p. 123. Both Congress and the Social Security Administration (SSA) have recognized the problem of work disincentives in the SSI program. As a result, the SSA has initiated three demonstration projects to evaluate alternative solutions. *See Social Security Bulletin*, vol. 44 (4) (April 1981), pp. 14, 18.

[88] Bowe, *Rehabilitating America*, p. xv. *See also* 126 Cong. Rec. H11628 (daily ed., Dec. 2, 1980) (remarks of Rep. Cavanaugh). Agreement that the benefits to society of full participation by handicapped people outweigh the costs involved does not, of course, answer serious questions concerning how such costs should be allocated between the private and public sectors.

ment; medical, psychological, and psychiatric services; means of transportation; and other essential services should be provided in ways that give handicapped individuals maximum opportunity to participate fully in society.

The general phrase "full participation" is even more useful as a guide to corrective action when we examine its specific components. The better we understand what the goal entails, the greater our ability to choose those actions that best advance it. The following material describes some important, closely interrelated components of full participation identified by the courts and in the professional literature.

Normalization

Normalization[90] has been described as "making available to the [handicapped person] patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society,"[91] and as "[U]tiliz[ing] of means which are as culturally normative as possible, in order to establish and/or maintain personal behaviors and characteristics which are as culturally normative as possible."[92] Put simply, normalization means that handicapped people should be treated as much as possible like other people of their same age, sex, and cultural background. It does not imply that handicapped people should be forced against their personal wishes to conform to what other people do, but rather that they should have the opportunity to engage in normal activities and lifestyle.[93]

Independent Living

Another aspect of handicapped people's full participation is independent living. A central element of this concept is self-determination for handicapped persons. Independent living programs insist on "client self-choice rather than incorporation of the client into a set of goals established by program managers,

[90] *See* Halderman v. Pennhurst State School and Hosp., 446 F. Supp. 1295, 1311 (E.D. Pa. 1978), *reversed and remanded on other grounds,* 451 U.S. 1 (1981). For a judicial discussion of the related term "mainstreaming," *see* Lora v. Board. of Educ. of City of N.Y., 456 F. Supp. 1211, 1264–71 (E.D.N.Y. 1978).

[91] *See* Bengt Nirje, "The Normalization Principle and Its Human Management Implications," *Changing Patterns in Residential Services for the Mentally Retarded,* p. 181.

[92] Wolf Wolfensberger, *The Principle of Normalization in Human Services* (Toronto: National Institute On Mental Retardation, 1972), p. 28.

[93] The corollaries and implications of the normalization principle have been the subject of considerable discussion in professional literature. Some identified elements of the normalization concept include: (a) normal rhythm of daily life for handicapped persons; (b) normal variation of locations, e.g., living and working in different places, and a variety of places for leisure activities; (c) normal rhythm of the year, with holidays and family days of personal significance; (d) an opportunity to undergo the normal developmental experiences of the life cycle: childhood in a real and stimulating environment, normal adolescent experiences of school and peers, a normal transition from dependence to independence and adulthood, and a period of old age close to familiar settings and acquaintances; (e) taking into account and respecting the choices, wishes, and desires of the handicapped person; (f) associating with members of the opposite sex; (g) the application of normal economic standards. *See* Nirje, "The Normalization Principle and its Human Management Implications," pp. 181–85; *see generally* Wolfensberger, *The Principle of Normalization in Human Services,* p. 28; Eveline D. Schulman, *Focus on the Retarded Adult: Programs and Services* (St. Louis: C.V. Mosby Co., 1980), pp. 64–73.

service professionals, or funding mechanisms. . . ."[94] This right to self-determination is the hallmark of the movement for independent living. Some advocates for independent living have elaborated on its meaning:

> Independent living is. . .to live where and how one chooses and can afford. It is living within the community in the neighborhood one chooses. It is living alone or with a roommate of one's choice. It is deciding one's own pattern of life—schedule, food, entertainment, vices, virtues, leisure, and friends. It is freedom to take risks and freedom to make mistakes.[95]

> The movement [for independent living] is based on the disabled population's desire to lead the fullest lives possible, outside of institutions, integrated into the community, exercising full freedom of choice.[96]

Congress recognized the concept of independent living in 1978 when it enacted "Comprehensive Services for Independent Living," a program providing grants to the States for the establishment and operation of independent living centers.[97]

Developmental Model

With full participation, handicapped people would not be summarily pigeonholed into particular roles, activities, and expectations, based upon one-time assessments of their needs and abilities. Since handicapped people have potential for growth, progress, and development, it is reasonable to expect their wishes, needs, and goals will not remain static. Consequently, decisionmakers need to use developmental models when planning and implementing programs for handicapped people. The developmental approach considers each individual as being in a continuous process of growth, learning, and development. Programs or activities for an individual should be determined by observation of the individual's behavior and current state of development and should be periodically reevaluated to monitor and enhance the individual's rate of progress.[98] This

[94] H. Cole, "What's New About Independent Living?" *Archives of Physical Medicine and Rehabilitation*, vol. 60 (1979), pp. 458–62, quoted in Center for Independent Living, "Independent Living: The Right to Choose," *Disabled People as Second-Class Citizens*, p. 248.

[95] G. Laurie, "Independent Living Programs," *Rehabilitation Gazette/79*, vol. 22 (1979), pp. 9–11, quoted in Center for Independent Living, "Independent Living: The Right to Choose," p. 247.

[96] Center for Independent Living, "Independent Living: The Right to Choose," p. 248. *See also* Center for Independent Living, "An Introduction to the Center for Independent Living," unpublished manuscript (1979), quoted in Center for Independent Living, "Independent Living: The Right to Choose," p. 247.

[97] Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95–602, Title VII, §§701 and 711, 92 Stat. 2995, 2998 (1978), 29 U.S.C.A. §§796 and 796e (West Supp. 1978–82). For a discussion of the emergence of the independent living concept as a component of Federal policy, *see* Lloyd Burton, "Federal Government Assistance for Disabled Persons: Law and Policy in Uncertain Transition," *Law Reform in Disability Rights*, vol. 2 (1981), pp. B–11 to B–14.

[98] For more extensive discussion of the developmental approach, *see* Bruce G. Mason, Frank J. Menolascino, and Lorin Galvin, "The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface," *Creigh-*

developmental principle provides the rationale for requiring annual reviews of rehabilitation plans,[99] habilitation plans,[100] and educational programs[101] under Federal legislation.

Dignity of Risk

A corollary of such concepts as normalization and independent living is the idea that handicapped persons are entitled to take normal risks.

> The dignity of risk is what the independent living movement is all about. Without the possibility of failure, the disabled person is said to lack true independence and the mark of one's humanity—the right to choose for good or evil.[102]

This principle counters overprotection of handicapped people. In warning professionals against an overly protective attitude toward handicapped clients, one authority has observed that "such overprotection endangers the client's human dignity, and tends to keep him from experiencing the risk-taking of ordinary life which is necessary for normal human growth and development."[103] For example, safety concerns should not prevent teaching mentally retarded children or blind children to navigate city streets. Similarly, handicapped persons, like their nonhandicapped peers, should be expected as they reach adulthood to leave the safety of their parental home and face the risks incident to moving out on one's own. Although concern for industrial safety is important, employment practices should not foreclose handicapped employees from undertaking the ordinary, reasonable risks some jobs entail. Allowing handicapped people to take their prudent share of human risks helps enable them to participate fully in society: "To deny any persons their fair share of risk experiences is to further cripple them for healthy living."[104]

The full participation goal and the principles it encompasses are points of reference for resolving questions about statutes, regulations, legal rules, government programs, and voluntary initiatives affecting handicapped people. The United States Supreme Court and other legal authorities have long recognized the value of looking at the underlying goal of a law when trying to interpret inconclusive statutory language.[105] For legislation affecting handicapped people, Congress has unambiguously declared that objective to be full participation. This goal provides essential guidance for our national efforts in designing, implementing, and evaluating public and private programs concerning handicapped people.

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ton L. Rev., vol. 10 (1976), pp. 137–38, especially nn. 33 and 34.

[99] 29 U.S.C. §722(b) (1976).

[100] 42 U.S.C. §6011(c) (1976).

[101] 20 U.S.C. §1413(a)(11) (1976).

[102] Gerben Dejong, "Independent Living: From Social Movement to Analytic Paradigm," Archives of Physical Medicine and Rehabilitation, vol. 60 (10) (1979), pp. 435–46, quoted in Center for Independent Living, "Independent Living: The Right to Choose," p. 247.

[103] Robert Perske, "The Dignity of Risk," *The Principle of Normalization in Human Services*, p. 195.

[104] Ibid., p. 199.

[105] Note, "The Supreme Court, 1981 Term," *Harv. L. Rev.*, vol. 96 (1982), p. 282, n. 30, and the authorities cited therein.

Part II

Chapter 5

Orienting Principles of Handicap Discrimination Law

The task of translating almost 30 Federal laws broadly prohibiting handicap discrimination into consistent, coherent legal standards is not easy. Courts and regulators over the past decade have struggled to clarify these requirements, but many issues remain disputed or relatively unexamined. Moreover, because many conceptual premises are unarticulated, rules developed in one particular factual setting may not apply to even a slightly different factual pattern. Consequently, in addition to analyzing these standards and focusing on the doctrine of reasonable accommodation, part II sets forth theoretical points of reference reconciling handicap antidiscrimination requirements.

Often, unstated assumptions about a social problem shape the approach people take to it. There are two common views with distinctly divergent assumptions and approaches to the problem of handicap discrimination. Many people see handicaps strictly as physical or mental disorders that limit ability. This assumption leads to the view that handicapped people are denied equal opportunity principally because they are "disabled" and cannot take advantage of many opportunities. Limited opportunities for handicapped people are considered to arise from the handicaps themselves rather than from societal choices. Under this view, the inability of paraplegics to maneuver their wheelchairs through narrow doorways or up stairs, for example, arises from their handicap.

The competing view emphasizes that societal actions and prejudice restrict opportunities for people with mental and physical limitations; the selection of architectural options other than ramps, elevators, or wide doors is the cause of handicap discrimination. Proponents of this view hold that there are no handicapped people—that it is society that "handicaps" people. Ignorant of their abilities and designed to operate without them, societal choices are seen as excluding people with handicaps.

These opposing viewpoints rarely exist in pure form. Those who emphasize physical and mental limitations often acknowledge that prejudices, not the limitations, are the cause of some denials of opportunity. Those who stress the social causes of handicaps frequently

concede that there are some individuals whose functional limitations prevent their participation. Nonetheless, the two views constitute basic points of orientation that often determine legal standards.

This chapter adopts a third view, which is based on the nature of handicaps, social conditions, and their interplay. Its conceptual premises are that all human physical and mental abilities occur in spectrums ranging from superb to nonexistent and that social contexts define the extent to which people with physical or mental limitations participate in society. Because these orienting principles together define the basic nature of handicaps, they help distinguish conduct toward handicapped people that is irrational, unnecessary, and, consequently, discriminatory from conduct that appropriately responds to physical and mental differences among people.

The Spectrum of Physical and Mental Abilities

> [I]n nature there are few sharp lines.
>
> [N]o humbling of reality to precept.[1]

Most popular conceptions and official usages of the term "handicapped" are based on the idea that there are observable physical and mental conditions called "handicaps," that the people denominated handicapped are significantly impaired in ways that distinguish them from "normal" (nonhandicapped) people, and that one either is or is not handicapped. The underlying reality, however, is not so easily categorized. Instead of two separate and distinct classes (handicapped and normal), there are spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional.

The simplistic categorization of "blind" and "sighted," for example, actually covers infinite gradations and variations of the ability to see. Vision is not one-dimensional, but rather involves a number of component functions, such as seeing at a distance, distinguishing colors, focusing on nearby objects, seeing in bright light, seeing in shade or darkness, seeing to the side, and so on. For each such visual function there is a range of abilities. For example, at one end of the visual acuity spectrum are the few people with unusually sharp eyesight—those who can read finer print than that on the bottom of a doctor's eye chart. At the other end are the tiny proportion with no vision whatsoever. The vast majority of people fall somewhere between these two extremes. A similar continuum occurs in regard to other component functions of the ability to see.[2]

Intellectual ability also occurs as a spectrum and varies with each individu-

[1] H.R. Ammons, *Corson's Inlet* (Ithaca, N.Y.: Cornell Univ. Press, 1965), pp. 6 and 8, lines 31 and 116.

[2] Other examples of the range of ability within different visual functions include differences in visual field varying from "tunnel vision" to those with excellent peripheral vision, and variations in the way the eyes focus, such as amblyopia, so-called "lazy eye." The parity or disparity of an individual's eyes also varies greatly: the vision may be approximately equal in both eyes, may be clearly superior in one eye, or may be present in only one eye.

al and with each different discipline and subject matter.[3] Similarly, mental health and emotional stability occur as a continuum, and people exhibit every imaginable degree of being in touch with reality and ability to cope with the demands of life.[4] Although commonly thought of as a distinct and homogeneous condition, epilepsy actually consists of a range of seizure disorders.[5] Other conditions considered handicaps, such as speech impairments, hearing impairments, learning disabilities, and

[3] The intelligence quotient (IQ) as measured by an intelligence test is an estimation of a person's "general intelligence," more typically in terms of one's ability to make appropriate or adaptive responses to a variety of situations occurring in everyday life. To facilitate the understanding of this concept, it is helpful to view general intelligence as if it were a uninterrupted continuum. One level of intelligence merges into the next, just as colors do when seen through a refracting prism. Levels of behavior that present certain patterns are called defective, still others dull-normal, and so on until the other end of the scale is reached, at which point they are labeled as "very superior" or "genius." In the general population this spread of intelligence follows what is usually referred to as a normal distribution curve.

Karol Fishler, "Psychological Assessment Services," *The Mentally Retarded Child and His Family,* ed. Richard Koch and James C. Dobson (New York: Brunner/Mazel Publishers 1976), p. 176. Most people are clustered near the middle of the continuum of intelligence, somewhere between the genius level and profound mental retardation. Moreover, even those with identical IQ scores differ widely in their ability to deal with various aspects of daily life. Intellectual ability also varies with regard to different subject matters: Some people are better at mathematical concepts than literature, some do well at history but not science, and so on. Thus, intelligence is a spectrum of relative degrees, not composed of distinct groups or susceptible to the drawing of sharp lines.

[4] The United States Supreme Court has observed: "At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable." Addington v. State of Tex., 441 U.S. 418, 426-27 (1979). From this hazy standard of relative normality, the mental health spectrum continues through an overlapping range of conditions labeled personality disorders, psychosomatic reactions, neuroses, and psychoses. Within each of these categories of psychiatric labels, there are endless variations and degrees.

[5] A seizure is an abnormal electrical discharge by nerve cells in the brain. The effects of these discharges range from the dramatic to the relatively inconsequential, depending upon the number of cells involved, the area in which they are located, and the duration and frequency of the discharges. Seizures range from the petit mal, an almost unnoticeable loss of consciousness for a few seconds, to the grand mal, which may last 2 or 3 minutes or more and involve a sudden loss of consciousness, falling to the ground, temporary interruption of breathing, and general convulsive or shaking movements. There are all sorts of variations in the manner of onset, the parts of the body affected, the individual's awareness of the occurrence, the severity of the seizure, and its aftereffects. The effectiveness of medication also varies among individuals, eliminating seizures for some, reducing the frequency for others, and failing completely for some others. The end result is a wide range of seizure conditions.

cosmetic disfigurements, also occur in wide ranges.[6]

Wide variations also occur in the applicability of devices and techniques for dealing with functional impairments. Wheelchairs, braces, walkers, crutches, prosthetic devices, canes, hearing aids, eyeglasses, and other devices may enhance the ability of different persons to different degrees. Moreover, life experience, motivational factors, and personal preferences affect how people deal with their functional limitations. One person who cannot see may choose to use a cane, a second to use a guide dog, and a third to go out only when accompanied by a sighted guide.

For each human function, there are some who excel, some who perform poorly, if at all, and some who perform at all levels in between. This simple concept's relevance to discrimination lies in the frequency with which it is ignored. Instead of discerning the range of individual abilities, society categorizes people as either blind or sighted, either epileptic or not epileptic, either handicapped or normal.

The Role of Social Context

Impairments in physical and mental abilities undeniably exist, but the degree to which they control a person's participation in society is as much inherent in the social context as in the impairment.

Depending on circumstances, certain abilities are crucial, while others are unimportant. Virtually everyone is "handicapped" for one purpose or another:

> Handicapped is a word Henry Viscardi [an employment authority] never uses. "Can you sing high C?" he likes to say. "No? Then you are totally and permanently disabled for an opera career. You're probably not fit to pitch for the Yankees, either."[7]

A Federal district court made a similar observation in discussing the relativity of impairments:

> Most citizens would be handicapped in playing baseball as compared to Carl Yastrzemski, in singing as compared to Beverly Sills, in abstract thinking as compared to Albert Einstein, and in the development of a sense of humor as compared to Woody Allen. Human talent takes many forms, and within each talent is a continuum of achievement. While one individual might be on the high end of the scale of achievement in one area, that same individ-

[6] The United States Supreme Court has acknowledged that physical and mental abilities occur as spectrums. In Board of Education v. Rowley, the Court discussed the responsibilities of States under the Education for All Handicapped Children Act:

> The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.

102 S.Ct. at 3048–49. *See also* Garrity v. Gallen, 522 F. Supp. 171, 206 (D.N.H. 1981).

[7] Edward Sullivan, "Henry Viscardi and the Mislabeled Disabled," *The Sign*, October 1967, pp. 36–37.

> ual might rank very low in another area. Woody Allen will probably never win the Triple Crown, and Carl Yastrzemski is not likely to perform "Aida." In sum, the identification of various gradations of handicap is not an easy task, especially if such is attempted in a vacuum. Assessing the capability of various individuals to perform without knowledge of the particular task under consideration and its various requirements, or without an individualized determination of their strengths and weaknesses would appear to be impossible.[8]

Concepts of normality and abnormality and of ability and disability have no real meaning unless they are considered in the context of the nature and purpose of a particular task or activity.

The great flexibility that exists for accomplishing most tasks and activities confirms this perspective. It is often incorrectly assumed that there is only one way of doing something—the customary way that "normal" people do it. But programs, activities, and facilities may actually be organized and structured in a variety of ways. The assignment of tasks and the methods of performing them can be changed in response to the abilities and characteristics of the person involved. As the simple and inexpensive changes listed in the introduction to this monograph prove, many impediments can easily be removed without sacrificing overall purposes and performance.

Although it is sometimes difficult to see alternatives when "things have always been done that way," the tasks that comprise most jobs are often easily changed.[9] A secretarial position, for example, frequently requires filing, answering the telephone, taking dictation, typing, and ordering supplies. But no factor inherent in the position of secretary demands that all the secretaries in the same office be able to do the same things.[10] In an office with several secretaries, these tasks might be assigned in various ways to achieve the same results despite different functional limitations. For example, a person with no hearing might perform typing, filing, and ordering supplies (and perhaps take dictation by lipreading) but not answer telephones.

In addition, there are different ways of performing each secretarial task. Dictation, for example may be taken with a tape recorder instead of shorthand; letters can be typed on a word processor that vocalizes letters or words that appear on the screen instead of a standard typewriter. In each case, one functional

[8] Garrity v. Gallen, 522 F. Supp. 171, 206 (D.N.H. 1981). *See also* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Haw. 1980).

[9] In the opinion of some business leaders, some declines in productivity in American industry have resulted from an unwillingness to consider alternative methods of designing products, manufacturing equipment, and organizing factories, while Japanese industries, for example, adopted more flexible automated manufacturing systems. *See* Gene Bylinsky, "The Race to the Automated Factory," *Fortune*, Feb. 21, 1983, pp. 52, 60, 64. Although this example does not directly involve handicapped people, it suggests in a broader context how much flexibility there is for accomplishing tasks and activities and producing goods and services.

[10] Some overlap of duties, of course, may be desirable to allow employees to cover the duties of temporarily absent personnel.

ability substitutes for another that may be impaired or missing.

One way of seeing the flexibility to carry out most tasks or activities is to analyze their essential aspects. A New York State judge, for instance, has distinguished the essential aspects of the vocation of teaching from the inessential:

> [T]he majority points out that a blind teacher (1) cannot possibly maintain proper discipline in the classroom or prevent altercations between students so as to avoid consequent lawsuits against the city; (2) mark the attendance rolls or grade written test papers; (3) supervise or direct fire drills and proper use of stairways in emergencies and (4) perform other administrative duties during non-teaching periods.
>
> All this may readily be conceded. But what the majority overlooks is that none of these disciplinary, administrative or clerical duties relates in the slightest degree to the basic qualification or fitness to teach. True, these incidental duties must be performed. But the Board, in furtherance of the fundamental policy of the State with respect to the employment of blind teachers otherwise qualified, may easily arrange for their performance by other sighted persons, whether such sighted persons be teachers, clerks or more mature students. Essentially the situation is one of mutual accommodation and adjustment by all concerned.[11]

Regardless of whether one agrees with the court's formulation of what tasks a teacher must perform to teach, the analytical process shows how an accommodation can permit a handicapped individual's participation. Understanding that the job of teaching does not necessarily require the performance of administrative or disciplinary tasks usually associated with it helps to suggest appropriate alternatives allowing a person with no vision to teach.

Relating the Spectrum of Abilities to Social Contexts

The consequences of functional impairments vary with each task and the different ways it may be accomplished. As a result, the correlation between an individual's place on the spectrum of particular abilities and his or her capacity to participate fully in society is not as direct or uniform as is commonly supposed. There are important distinctions between *mental and physical differences, functional impairments, activity restrictions, and vocational and avocational limitations.* Handicap discrimination occurs when decisionmakers gloss over these distinctions by assuming that physical or mental differences invariably limit abilities and preclude participation.

Each individual differs from all others mentally and physically. Not all *mental and physical differences,* of course, are viewed as negative. Traits like extremely

[11] Matter of Chavich v. Board of Examiners of Bd. of Educ. of City of N.Y., 23 A.D.2d 57, 67–68, 258 N.Y.S.2d 677, 687 (App. Div. 1965) (dissenting opinion of Rabin, J.), adopted in Bevan v. New York State Teachers Retirement Sys., 74 Misc.2d 443, 345 N.Y.S.2d 921 (N.Y. Sup. Ct. 1973). *See also* Gurmankin v. Costanzo, 411 F. Supp. 982, 986–88 (E.D. Pa. 1976), *aff'd* 556 F.2d 184 (3d Cir. 1977).

high intelligence, double-jointedness, and photographic memory, for example, are not considered limitations. Our society, however, frequently operates on the faulty assumption that mental and physical differences must be measured against a norm and that anyone whose abilities fall below this norm is abnormal.

Mental or physical differences that interfere with ability to function are said to produce *functional impairments* or limitations. All that functional impairment means, however, is that some particular part of the body or aspect of the mind does not operate the way it does for most people.[12] Functional impairments include joints that do not permit the usual ranges of motion, nerves that do not transmit messages correctly to the brain or muscles, and mental irregularities that prevent people from absorbing or interpreting appropriate sensations and data. These impairments, of course, are not either-or propositions; each occurs in a spectrum of degrees.

Activities may be thought of as groups or clusters of functions. The activity of swimming, for example, involves the functions of pulling with the arms, kicking with the legs, turning to breathe, and so on. Functional impairments may or may not act as *activity restrictions* for various reasons. First, one functional limitation does not necessarily affect a person's other abilities. Having impaired hearing, for example, does not limit activities like running, swimming, and reading. Only those activities that directly involve the impaired function will be affected. Second, activities can often be accomplished by substituting another functional ability for one that is impaired. Thus, people with limited hearing may use their eyes to lipread (speech read), or a person who cannot use normal strokes to swim because of an amputated arm may learn different strokes that require only one arm. Third, the way an activity is described may determine whether an individual with a functional impairment can accomplish it. For example, a person whose legs are paralyzed may not be able to perform the activity of walking. But if the activity is described as locomotion or getting from place to place, a person in a wheelchair may be perfectly capable of performing it. Finally, mechanical devices or other aids may reduce or eliminate the extent to which functional impairments restrict activities.

Activity restrictions, in turn, may or may not lead to *vocational and avocational limitations*. A person whose functional impairment restricts a particular activity cannot perform a job or engage in a pastime of which that activity is an essential component—unless another accomplishable activity can be substituted for it. A quadriplegic cannot be an NFL fullback, and a mentally retarded person

[12] Additionally, some people who do not have an actual functional impairment may be perceived and treated as if they do:

> A person with epilepsy, for example, clearly has a medical irregularity. If, however, the person's condition can be controlled through medication, there does not have to be any functional impairment whatever. . . .Likewise, persons with serious cosmetic disfigurements may be considered handicapped but have no functional impairments. . . .

Robert Burgdorf, Jr., ed., *The Legal Rights of Handicapped Persons* (Baltimore: Brookes Publishing Co., 1980), p. 8 (hereafter cited as *The Legal Rights of Handicapped Persons).*

is unlikely to become an astrophysicist. But by dictating notes, letters, reports, and similar materials instead of handwriting them, a quadriplegic may be able to perform very well, for example, as a college professor, office worker, lawyer, or economist. And by dividing instructional materials and training into simple direct steps, an employer or educator may enable a severely mentally retarded person to perform complex tasks. No social setting will be entirely neutral with respect to all functional impairments. All societies organize tasks and activities according to values and needs. Particular tasks will always call upon some cluster of abilities that will advantage some and disadvantage others.

Understanding these distinctions makes it easier to distinguish when a physical or mental difference unavoidably limits vocational or avocational pursuits from when the controlling cause is prejudice or an overly rigid social setting. Because not all physical or mental differences cause functional impairments, and not all functional impairments restrict activities, and not all activity restrictions cause vocational or avocational limitations, actions based on the assumption that people with a particular type of handicap are incapable of participating in a given opportunity frequently are discriminatory.

Due to the complexity and diversity of social and economic contexts, the correlations of functional impairments to activity restrictions, and of activity restrictions to vocational and avocational limitations, are inexact and complicated.[13] Just as individuals are infinitely varied, society has an extremely broad range of institutions, programs, tasks, and activities. As a result, the process of matching particular persons who have specific functional impairments with appropriate opportunities to participate in our diverse and complex society necessarily is highly intricate and individualized.

Nonetheless, if both the needs of the program and the abilities of the person are viewed individually, people with varying functional impairments may be "matched" with many programs and activities in ways that permit their full participation. This issue of matching people and programs is central to the doctrine of reasonable accommodation and will be developed further in chapter 6. The existing view of handicapped people and their ability to participate is quite different.

Reality Distorted: The Handicapped-Normal Dichotomy

Structuring society's tasks and activities on the basis of assumptions about the normal ways of doing things reflects the idea that there are "normal" people who can participate and there are people with physical and mental handicaps who cannot. When people are classified as either handicapped or normal, the only questions are who falls into which category and what criteria are used. A close examination of this handicapped-normal dichotomy, however, reveals fundamental flaws: it ignores the fact that abilities occur as spectrums, not as all-or-nothing

[13] Another layer of complexity results if one goes beyond the question of vocational and avocational pursuits and looks at standards of success in life. *See The Legal Rights of Handicapped Persons*, pp. 8–9.

categories, and discounts the importance of social context.[14] The resulting distortion of reality is the wellspring of handicap discrimination.

All people observe each other's abilities, characteristics, and limitations. People notice, for example, that Tom is very agile, that Mary does not hear what is said to her, that one of Joe's arms has been amputated, that Sally's mind works very quickly, that Hal can perform only simple tasks, that Ted cannot move his arms and legs, and so on. These are concrete, discernible aspects of reality. Because each society needs ways of thinking about and communicating such observations, its members create generalized rules for classifying and labeling reality. Each socially accepted abstraction from the observable, immediate reality, however, risks distortion, which can lead to discrimination.

The handicapped-normal dichotomy distinguishes normal functioning levels from "defective" ones. But because mental and physical abilities occur in spectrums, efforts to draw such sharp dividing lines are inevitably arbitrary and often misleading.[15] Defining 20/20 as the standard for normal visual acuity is an arbitrary convention. For functional abilities that are distributed through the population in an approximation of the bell-shaped normal distribution curve,[16] the demarcation is frequently based on the statistical concept of "standard deviations" from the median. For other conditions, such as epilepsy and psychiatric disorders, the judgment of what is normal and what is abnormal or defective is left largely to the discretion of the medical practitioner.

Whether derived from mathematical logic or professional discretion, any line that labels some levels of ability as normal and others as abnormal breaks an infinite spectrum of human functioning into two distinct categories. The artificiality of such categorization is especially apparent when one examines the individuals who fall immediately on opposite sides of the dividing line. One is normal and the other is "abnormal," even though they have more in common with each other than with those whose abilities are farther away from the boundary line.

Another aspect of the handicapped-normal classification involves the creation of disability categories, such as orthopedic handicaps, blindness, deafness, mental illness, mental retardation, and learning disabilities. Such categories are based on the classification schemes described above and bear the resulting imprecision and mischaracterizations. They also lump a variety of conditions under a single label. A person

[14] For a discussion of the complexities inherent in concepts of disabilities, impairments, and limitations, and the problems with dichotomizing the continuum of disability, *see* Irving Howards, Henry P. Brehm, and Saad Z. Nagi, *Disability: From Social Problem to Federal Program* (New York: Praeger, 1980), pp. 31–34, 121–22, and the authorities cited therein.

[15] *See, e.g.*, Prudence M. Rains, John I. Kitsuse, Troy Duster, and Eliot Friedson, "The Labeling Approach to Deviance," *Issues in the Classification of Children*, ed. Nicholas Hobbs (San Francisco: Jossey-Bass, 1975), vol. 1, p. 91 (hereafter cited as *Issues in the Classification of Children).*

[16] The normal distribution or Gaussian curve is a schematic representation of the distribution of various characteristics and of other mathematical and statistical phenomena. *See, e.g., International Encyclopedia of Statistics* (New York: Free Press, 1978), pp. 161–62; A.L. O'Toole, *Elementary Practical Statistics* (New York: Macmillan, 1964), pp. 158–80.

who has an amputated foot, a person with a spinal disorder, and a person who is unable to move an elbow joint due to arthritis, for example, are all encompassed by the single heading "orthopedically impaired."

How handicapped one must be to be covered by a disability grouping—how much motor limitation constitutes an "orthopedic handicap," how much hearing loss constitutes "deafness," and so on—are determined as much by society as by real physical or mental differences.[17] When the American Association on Mental Deficiency redefined the term "mental retardation" in 1973, it clearly illustrated how extensively disability groupings reflect the classification and labeling process itself:

> Before the redefinition, *mentally retarded* included all those persons whose scores on standardized tests were one standard deviation below the norm; afterward, only those who were two standard deviations below the norm were included. By this definitional shift, about eight million persons who had been labeled "borderline mentally retarded" were no longer considered mentally retarded at all, and the incidence of mental retardation was reduced from approximately 3% to approximately 1% of the population.[18]

Such an example demonstrates that lines drawn to create disability categories cannot accurately reflect qualitative differences or clearly distinguish the "handicapped" group from others.

The overall status category "handicapped person" compounds all these problems of arbitrariness by lumping together all the physical and mental differences considered abnormal by society.[19] A blind person, an amputee, a mentally retarded person, a person with epilepsy, a deaf person, and a learning-disabled person may have nothing in common with each other and yet be grouped together as handicapped persons. Conditions denominated handicaps frequently share nothing with each other except the label:

> Whatever characteristics such individuals may or may not have had in common prior to their classification, it is their involvement in the classifiction process that has generated the characteristics they all share—

The legal definition therefore serves to crystallize blindness as both a social status and an experience of self for those persons who might not otherwise have defined themselves as blind.

[17] The distinction is not "given," so to speak, by reality. Instead, salient and socially meaningful differences among persons (and acts) are a product of our ways of looking, our schemes for seeing and dealing with people. Thus, people are *made* different—that is, socially differentiated—by the process of being seen and treated as different in a system of social practices that crystallizes distinctions between deviant and conventional behavior and persons. For example, the legal definition of blindness is clear-cut, but it includes poorly sighted persons as well as persons who are totally impaired visually. Rains, Kitsuse, Duster, and Friedson, *Issues in the Classification of Children*, p. 94.

[18] *The Legal Rights of Handicapped Persons*, p. 12 *see also* the authorities cited therein.

[19] *See* Jacobus ten Broek and Floyd W. Matson, "The Disabled and the Law of Welfare," *Cal. L. Rev.*, vol. 54 (1966), p. 11.

their social fate as members of a status category.[20]

As a United States court of appeals has observed: "'The handicapped'. . .are not a homogeneous group, and all that those who come within the rubric 'handicapped' share is some trait outside the normal range of capabilities for that trait."[21]

The overall handicap status category may be the most distorting of the various societal abstractions and generalizations regarding the functional differences of people. It fosters the erroneous idea that all people who differ significantly from the norm in regard to any functional ability are somehow alike and should be treated similarly to each other and differently from the rest of society.[22]

The fact that drawing lines through the continuum of real differences among people distorts reality does not mean that classifications should never occur. To classify, study, and communicate about similar types of functional impairments, society needs ways to standardize descriptions of functional abilities. As a result, we use measurements (such as eye charts, audiometers, and IQ tests) and terminology (such as quadriplegia, epileptic seizure, and schizophrenia). These classifications necessarily sacrifice some degree of specificity and concreteness.[23] But as long as the arbitrariness of the labels and categories is recognized and their usage appropriately confined, such classifications can be valid and constructive. In particular, the more closely the function and placement of any classifying line are related to the task or purpose for which the categorization is made, the more appropriate the dividing line is. For example, ability to see a radar screen is essential to performing a job as an air traffic controller. Insofar as a visual acuity standard can be correlated with ability to read a radar screen accurately, the use of such a standard is an appropriate limitation upon job eligibility for an air traffic controller position. On the other hand, a requirement of normal vision for a job as lawyer is of doubtful validity, given that many blind attorneys are currently practicing law in a wide variety of contexts,[24]

[20] Rains, Kitsuse, Duster, and Friedson, *Issues in the Classification of Children*, pp. 91-92.

[21] Shirey v. Devine, 670 F.2d 1188, 1204 (D.C. Cir. 1982).

[22] The problems created by the handicapped-normal dichotomy paradoxically have required the use of the terms "handicap" and "handicapped person" in Federal and State legislation. Such terminology gives the appearance of accepting the handicapped-normal dichotomy. It may also create an impression that the distinctions between those labeled handicapped and others are legislatively authorized or mandated. Such appearances should not obscure the fact that Federal laws use these terms in remedial and rational ways to provide opportunities and services previously unavailable to many people. It is appropriate to speak of a class of handicapped people when certain individuals have been singled out, designated handicapped, and treated poorly as a result. To rectify this situation, legislative remedies have to focus on the disadvantaged class of handicapped persons.

[23] The eye chart, for example, measures only a person's ability to see a particular type of printing on a particular background in the particular lighting and conditions in which the testing occurred; an IQ test measures test-taking skills as well as aspects of overall intelligence; and terms like "epileptic seizure" include a broad diversity of conditions and manifestations.

[24] For example, the American Blind Lawyers Association is a national association of partially sighted and totally blind attorneys that has approximately 150 members. 1982 American Blind Lawyers Membership Directory. *But see*

and exclusion of all blind applicants from positions of school teachers has been held to be unjustified discrimination on the basis of handicap.[25]

The handicapped-normal dichotomy mirrors a view of handicapped people as inherently limited in ability, in contrast to the "healthy" and the "majority of reasonably fit people who are the workers and earners."[26] This perspective can lead those who plan services, programs, and facilities[27] to overlook "those who vary more than a certain degree from what we have been conditioned to regard as normal."[28] As a result, except for programs specifically targeted for the handicapped population, virtually all of society—from its sidewalks to its schoolrooms to its jobs—has until very recently been designed for people whose abilities fall in what has been labeled the normal range. Some authorities describe this problem as first and foremost a result of "simple thoughtlessness" and "primarily a matter of oversight."[29] The assumption that handicapped people are fundamentally different and inherently restricted in their abilty to participate becomes self-fulfilling as handicapped people are excluded from education, employment, and other aspects of society by these consequences of the handicapped-normal dichotomy.

Legal Implications of the Spectrum and Social Context Principles

In reality, vocational and avocational limitations result from the interactions of physical and mental differences occurring as spectrums and social contexts determining the consequences of these differences. But societal responses based on the handicapped-normal dichotomy distort this reality. This discrepancy between what actually exists and how society has responded to it is the essence of handicap discrimination. As a result,

Coleman v. Darden, 595 F.2d 533 (10th Cir. 1979), *cert. denied*, 444 U.S. 927 (1979).

[25] Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977), *vacated on other grounds*, 626 F.2d 1115 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (the district court noted that over 400 blind persons were teachers in the U.S. 411 F. Supp. at 986); Zorick v. Tynes, 372 So.2d 133 (Fla. Dist. Ct. App. 1979).

[26] Henry Fairlie, "Overdoing Help For the Handicapped," *The Washington Post*, June 1, 1980, p. D–3.

[27] "Our buildings, communications technologies, modes of transportation, and other programs were developed to meet the needs of people who lived in the community; disabled individuals, who did not, were not considered in the planning of these facilities and services." Frank Bowe, statement, *Civil Rights Issues of Handicapped Americans: Public Policy Implications*, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., May 13–14, 1980, p. 10.

[28] "Report of the United Nations Expert Group Meeting on Barrier-Free Design," *International Rehabilitation Review*, vol. 26 (1975), p. 3. *See also* Lloyd Burton, "Federal Government Assistance for Disabled Persons: Law and Policy in Uncertain Transition," *Law Reform in Disability Rights: Articles and Concept Papers*, vol. 2 (Berkeley: Disability Rights Education and Defense Fund, 1981), p. B–16.

[29] Kent Hull, *The Rights of Physically Handicapped People* (New York: Avon Books, 1979), p. 67. The United States Congress concurred in this view that an out-of-sight, out-of-mind attitude toward handicapped persons has led to their being overlooked in the planning process and has resulted in the creation of the barriers to their integration into society: "Until this Nation has the foresight to include in all of its planning the need to make all areas of society accessible and usable to individuals with handicaps, they will continue to be excluded and will have little or no opportunity to achieve their basic human right of full participation in life and society." S. Rep. No. 1297, 93rd Cong., 2d Sess. 56, *reprinted in* 1974 U.S. Code Cong. and Ad. News 6373, 6406.

the spectrum and social context orienting principles have profound implications for handicap discrimination law. They elucidate the basic legal concepts guiding handicap discrimination law, which are discussed below, which then generate the more specific legal standards discussed in the next chapter.

Exclusions Based on Inaccurate Generalizations

Because it inherently blurs key distinctions, the handicapped-normal dichotomy reflects and causes unwarranted assumptions about handicapped people's abilities that, in turn, result in discrimination. Such discrimination occurs when disability classifications arbitrarily disqualify handicapped people from participating. For legal purposes, two major types of exclusionary classifications can be distinguished: traditional disability classifications and selection criteria.[30]

Traditional disability classifications define excluded groups through labels such as blind, deaf, or quadriplegic. Stigmatizing as well as excluding,[31] these blanket exclusions reflect assumptions about correlations between physical and mental impairments, activity restrictions, and vocational and avocational limitations of the individuals so labeled. Because these assumptions frequently are incorrect, disability status categories often include people who, in fact, are qualified to perform the particular tasks or activities at issue, either with or without a reasonable accommodation.[32] Such overinclusive classifications preclude or prejudice consideration of individual abilities. As a State appellate court succinctly declared with respect to blindness, "The presumed incapacity of the blind is a profoundly disabling heritage, preventing demonstration of ability in fact."[33] In a decision regarding a State school's treatment of institutionalized mentally retarded people, a Federal district court judge recently noted:

> Defendants have often made placements and disbursed services based not on an individual assessment of the abilities and potentials of each resident but on the generalized assumption that certain *groups* of people (e.g., profoundly retarded or nonambulatory people) are unable to benefit from certain activities and services. This kind of blanket discrimination against the handicapped, and especially against the most severely handicapped, is unfortunately firmly rooted in the history of our country. . . .[34]

[30] The legal standards governing exclusionary classifications are examined in chap. 6 in the section entitled "Exclusionary Classifications."

[31] The stigmatizing aspects of handicap discrimination are discussed in chap. 2 in the subsection entitled "Stigmatization."

[32] Many handicapped people purchase for personal use prescription medications or devices to ameliorate the effects of disability-caused functional limitations, e.g., medications for epilepsy, eyeglasses, magnifying glasses, hearing aids, canes, crutches, walkers, etc. Other handicapped people may even supply their own personal assistants, particularly for a short-term situation, such as bringing a reader or interpreter to take a test. Such measures are not usually considered to be accommodations but might become accommodations if purchased by a program and used only for program activities or tasks.

[33] Zorick v. Tynes, 372 So.2d 133, 135 (Fla. App. 1979).

[34] Garrity v. Galen, 522 F. Supp. 171, 214 (D.N.H. 1981). *See also* Connecticut Inst. for the

Selection criteria—requirements that purport to measure physical or mental abilities or the ability to perform certain tasks or activities[35] —may also unnecessarily exclude handicapped people. Such criteria differ from stigmatizing disability classifications in that they substitute measures of ability for labels of ability. Examples of selection criteria include weight-lifting requirements for certain postal jobs and specific visual acuity requirements for certain teaching jobs. Needless discrimination occurs when selection criteria inaccurately measure abilities, accurately measure abilities but inadequately correlate them with activities, or fail to appreciate available options that permit participation or performance.

Equal Opportunity and Reasonable Accommodation

Handicap antidiscrimination law must, of course, acknowledge functional impairments, but it must also focus on ways in which society can reasonably adapt to a wider range of mental and physical differences than the handicapped-normal dichotomy has permitted.

By not automatically assuming that people with certain handicaps are unable to participate or compete and by treating them identically to nonhandicapped people, society might provide a limited kind of equal opportunity. Identical treatment might eliminate some of the prejudices and misconceptions about handicapped people. Such identical treatment, however, would not foster the provision of alternative ways of achieving given tasks or objectives so that handicapped people could have meaningful opportunities to participate. When decisionmakers forget that social contexts almost always are structured for nonhandicapped people, they are apt to view anything beyond such identical treatment as special, unequal treatment necessitated by the handicapping condition. This perspective views handicapped people as inherently limited. Such an approach would give the form, but not the substance, of equal opportunity.

The idea that identical treatment does not always result in real equality of opportunity springs from traditional doctrines of nondiscrimination law. In a landmark race discrimination employment case, the U.S. Supreme Court said:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the jobseeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use.[36]

Similarly, in *Lau v. Nichols*,[37] the Supreme Court ruled that the failure of a

Blind v. Connecticut Comm'n on Human Rights and Opportunities, 176 Conn. 88, 405 A.2d 618, 621 (1978).

[35] Some selection criteria are stated negatively; they check for physiological "irregularities" in the belief that such measurements correlate with ability.

[36] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[37] 414 U.S. 563 (1974). The case considered the claim of approximately 1,800 non-English-speaking students of Chinese ancestry that the San Francisco, California, school system was denying

school system to provide bilingual education to students whose primary language was not English constituted unlawful discrimination in violation of Title VI of the Civil Rights Act of 1964.[38]

> [T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.[39]

Courts have frequently used this rationale for accommodation with respect to equal educational opportunity for handicapped children, perhaps because universal, compulsory public education was one of our Nation's first experiments with the full participation mandate.[40]

Individualization

Another way of summarizing the orienting principles this chapter presents is to say that handicapped people are unnecessarily excluded from society because of two types of inaccurate generalizations: generalizations about functional impairments and activity restrictions and generalizations about the ability of society reasonably to adapt to mental and physical differences. This orientation emphasizes that handicapped people and the particular social setting must be assessed with greater particularity if such generalizations are to be avoided. Individualization, an "individualized assessment of ability,"[41] in an identified setting is the only effective means of dealing with overgeneralizations about handicapped people to achieve meaningful equal opportunity and full participation.

The principle of individualization requires an examination of both the true effect of functional impairments on activities and the availability of alternative methods of performing tasks or activities. In an employment case, a Federal court has declared:

> [T]he real focus must be on the individual job seeker, and not solely on the impairment or perceived impairment. This necessitates a case-by-case determination of whether the impairment or perceived impairment. . .constitutes, for that individual, a substantial handicap to employment.[42]

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them equal educational opportunity by offering instruction only in the English language.

[38] 42 U.S.C. §2000d (1976). Title VI prohibits discrimination on the basis of race, color, and national origin by recipients of Federal financial assistance. The language of §504 closely tracks the language of Title VI. See chap. 3 in the section entitled "Rehabilitation Act of 1973."

[39] 414 U.S. at 566.

[40] *See* New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 854 (10th Cir. 1982); Gary B. v. Cronin, 542 F. Supp. 102 (N.D.Ill. 1982).

[41] Garrity v. Gallen, 522 F. Supp. at 206.

[42] E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Haw. 1980). The Supreme Court of Connecticut has declared: "Blanket exclusions, no matter how well motivated, fly in the face of the command to individuate that is central to fair employment practices." Connecticut Inst. for the Blind v. Connecticut Comm'n on Human Rights and Opportunities, 176 Conn. 88, 405 A.2d 618, 621 (1978).

The concern is individual ability, not the presence or absence of a label. Individualization might require tailoring of eligibility and program requirements, facilities, and equipment to fit the needs of particular individuals. Thus, a piece of equipment or furniture might have to be altered to permit a particular person to use it. This alternative cannot be accomplished on a generalized or universal basis. A case-by-case review assessing the functional abilities of a specific person is required.

Several Federal laws have adopted individualization requirements. Under the Education for All Handicapped Children Act,[43] for example, public school systems are required to develop a written individualized education program for each handicapped child to tailor programs for the child's unique needs.[44] Similarly, the Rehabilitation Act requires agencies to develop an "individualized written rehabilitation program"[45] for each handicapped individual. And federally funded developmental disabilities programs must fashion an individualized, written "habilitation plan" for each developmentally disabled person receiving services.[46]

Understanding how the spectrum of physical and mental differences interacts with the social context and how this reality is distorted by the handicapped-normal dichotomy provides, in turn, an understanding of the key legal concepts of meaningful equal opportunity and individualization. It is around these concepts that the important legal standards of reasonable accommodation have been developed.

[43] 20 U.S.C. §§1401 *et seq.* (1976).
[44] 20 U.S.C. §1401 (19) (1976).
[45] 29 U.S.C. §721 (9) (1976).
[46] 42 U.S.C. §6011(a) (1976). Individualization is discussed further in chap. 6.

Chapter 6

Legal Standards for Reasonable Accommodation

Discrimination against handicapped people cannot be eliminated if programs, activities, and tasks are always structured in the ways people with "normal" physical and mental abilities customarily undertake them. Adjustments or modifications of opportunities to permit handicapped people to participate fully have been broadly termed "reasonable accommodation." Doctrines governing the duty to provide reasonable accommodation are still in a formative stage. Neither judicial decisions nor regulations interpreting handicap discrimination laws clearly define this key legal concept. The lack of an accepted operational definition has caused considerable confusion both as to what reasonable accommodation encompasses and what standards govern its application in particular contexts. This chapter provides a framework for resolving such issues.

The phrase "reasonable accommodation" originated in employment regulations issued pursuant to section 504 of the Rehabilitation Act of 1973. "Accommodation," however, has been used generically outside the employment context to describe individualization of opportunities for handicapped people. The term also has encompassed the removal of architectural, transportation, and communication barriers that exclude groups of people with similar functional limitations. Examples of these kinds of accommodation include building ramps for people using wheelchairs and captioning television programs for those with hearing impairments.

As a working definition, this chapter uses reasonable accommodation to mean providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity. Individualizing opportunities is this definition's essence.

Under this definition, the removal of architectural, transportation, or communication barriers to groups of handicapped people is not reasonable accommodation. Although removing environmental barriers responds to the spectrum of individual abilities, it does not focus on an assessment of the particular abilities of any one person. Frequently, the removal of such barriers is a precondition to individualization, since there can be no adequate assessment of the individual abilities of handicapped peo-

ple who cannot even reach or enter the front door. But removing barriers tends to be a long-term change that presents considerations of costs, planning, and implementation different from those for individualized accommodation. Moreover, barrier removal does not depend on the presence of any specific individual; it can be required and accomplished before any handicapped individual appears on the scene or requests compliance. Of course, even though not within our definition of reasonable accommodation, modifications removing environmental barriers are required by various Federal handicap discrimination laws.

The definition of reasonable accommodation used in this chapter also does not cover the elimination of illegal exclusionary classifications. Like architectural, transpor- tation, and communication barriers, rules and standards that use traditional disability labels or other arbitrary selection criteria exclude whole groups of handicapped people. To eliminate classifications inadequately related to the program or task in question requires no assessment of the functional abilities or needs of any particular handicapped individual. Unlike reasonable accommodation and the removal of environmental barriers, both of which require modifications, a simple decision to stop using it is generally all that is required to eliminate an illegal exclusionary classification.

In addition to definitional problems, reasonable accommodation law has developed different standards in different societal areas. For example, Federal equal educational opportunity rights, as chapter 3 explains, require public elementary and secondary education systems to tailor their programs to the needs of each handicapped child. With respect to employment, however, because the right to equal employment opportunity is not the same as the right to a job, individual tailoring requirements are more limited.

Similarly, reasonable accommodation law assigns different legal consequences to the costs of accommodation in different societal areas. In elementary and secondary education, the law is clear that handicapped children are entitled to an individualized education program. Cost may be a factor in choosing among different ways of providing meaningful educational opportunity in the least restrictive setting, but it cannot defeat the right itself. In employment, however, high costs may be a defense to providing a specific accommodation, although not to considering handicapped people on an individual basis. Apart from reasonable accommodation requirements, the role of cost considerations in the legal requirement that mass transit systems be accessible has been controversial. Cost may excuse the lack of total accessibility, but it does not preclude choosing among various alternatives for providing meaningful forms of access to public transportation.

Several components of the legal duty of reasonable accommodation are straightforward and well established. But because of individualization requirements and the resulting ad hoc nature of reasonable accommodation decisions, regulators and courts have struggled to find principles for deciding when, in what ways, and to what extent the many institutions, programs, activities, and tasks covered by handicap discrimina-

tion laws must accommodate the infinite gradations of human abilities. An extensive review of existing regulations, case law, and legal literature suggests that this extremely diverse factual reality makes simple, universal rules impossible.

Because of the number, complexity, and interplay of the variables involved in reasonable accommodation, this chapter can only summarize those principles that have emerged and provide a framework, with examples, for understanding and applying the doctrine. The chapter concludes that reasonable accommodation is not a set of hard and fast rules, but a process.

The chapter first details the general meaning of reasonable accommodation, traces its origins, provides concrete examples of reasonable accommodations, and discusses the necessity and importance of the reasonable accommodation concept to handicap law. Next, the chapter examines the reasoning and implications of the U.S. Supreme Court's only decision to date on this issue. The chapter then discusses the legal standards governing the application of reasonable accommodation, including who is an "otherwise qualified handicapped individual," how individualized accommodations are made, and what the limits are on the requirement to accommodate. Finally, the chapter explains two areas of handicap law that are prerequisites to reasonable accommodation: the law governing blanket exclusions, selection criteria, and other discriminatory mechanisms that preempt the question of whether an accommodation is needed; and the law governing the removal of architectural, transportation, and communication barriers.

What Is Reasonable Accommodation?

The legal term of art "reasonable accommodation" was first used with respect to handicap discrimination in 1977[1] in the U.S. Department of Health, Education, and Welfare's (HEW) regulations to implement section 504 of the Rehabilitation Act of 1973. The scope of the regulations was wide,[2] but the phrase reasonable accommodation applied only to employment practices[3] and was defined only by examples:

[1] The phrase "reasonable accommodation" occurs in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(j) (1976), defining the obligation of employers to accommodate the needs arising from religious practices, unless to do so would impose an "undue hardship." In Trans World Airlines v. Hardison, 432 U.S. 63 (1977), the U.S. Supreme Court held that an employer need not make such an accommodation if it would require "more than a *de minimis* cost." *Id.* at 84. These principles do not apply in the context of discrimination on the basis of handicap. Prewitt v. United States Postal Service, 662 F.2d 292, 308 n. 22 (5th Cir. 1981). The Court's restrictive ruling was motivated in part by a desire to avoid first amendment problems concerning the Constitution's protection of the free excercise of religion and its prohibition against establishing a religion. *See* Trans World Airlines v. Hardison, 432 U.S. 63, 81; *see also* Note, "Anderson v. General Dynamics Convair Aerospace Division: First Amendment Establishment Clause Challenge to Title VII's Mandated Accommodation of Religion," *Nw. U.L. Rev.*, vol. 76 (1981), p. 487.

[2] The 1977 regulations, which are still in effect, cover employment; program accessibility (architectural barriers); preschool, elementary, and secondary education; postsecondary education; and health, welfare, and social services. *See* the current version of the regulations, now issued by the Department of Health and Human Services, 45 C.F.R. pt. 84 (1982).

[3] 45 C.F.R. §84.12 (1982).

> Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and useable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.[4]

The U.S. Department of Labor also used the phrase reasonable accommodation in its regulations implementing section 503 of the Rehabilitation Act. In that context, reasonable accommodation is part of the obligation of Federal contractors to refrain from discrimination and to take affirmative action to employ and promote qualified handicapped people. The regulations specify that contractors "must make a reasonable accommodation to the physical and mental limitations of an employee or applicant. . . ."[5] Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) to implement section 501 protecting Federal employees and applicants also use reasonable accommodation in the same way the phrase was used in the HEW regulations.[6]

These regulations soon were supported by Congress. Section 505 of the Rehabilitation Act, passed a year after the reasonable accommodation regulations went into effect, permits courts to consider "the reasonableness of the cost of any necessary work place accommodation and the availability of any alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy."[7] In its original sense, then, reasonable accommodation referred only to modifications on the job that took into account the disabilities of individual handicapped employees and applicants in order to increase their opportunities.

Handicap discrimination law also uses other phrases to convey the concepts that reasonable accommodation embodies. One of the most litigated of these is the meaning of the "related services" requirement in the Education for All Handicapped Children Act (EAHCA).[8] To provide "free appropriate public education,"[9] school systems receiving EAHCA funds are required to provide "special education and related services,"[10] defined as including:

> transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupa-

[4] *Id.* §84.12(b) (1982).

[5] 41 C.F.R. §60.741.6(d) (1982). The regulations use the term reasonable accommodation to encompass such workplace modifications as "including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, or other accommodations." See chap. 3 in the section entitled "Rehabilitation Act of 1973."

[6] 29 C.F.R. §1613.704 (1982). See chap. 3 in the section entitled "Rehabilitation Act of 1973."

[7] 29 U.S.C. §794a(a)(1) (Supp. V 1981). Issues of undue hardship, including excessive costs, that may arise from such efforts are generally considered limitations on the duty to accommodate and are discussed in this chapter in the section entitled "Limitations Upon the Obligation to Accommodate."

[8] For a description of the Education of All Handicapped Children Act, see chap. 3 in the section entitled "Education for All Handicapped Children Act."

[9] 20 U.S.C. §1412(1) (1976).

[10] *Id.* §1401(17) (1976).

tional therapy, recreation, and medical and counselling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.[11]

Courts have frequently ordered, under section 504, related services that parents of handicapped children have requested both alone[12] and in conjunction with the EAHCA.[13]

Similarly, section 504 education regulations require postsecondary institutions receiving Federal financial assistance to make "academic adjustments"[14] to the needs of handicapped students. Provision of individualized habilitation services to developmentally disabled people under the Developmental Disabilities Assistance and Bill of Rights Act[15] and to handicapped people under the Rehabilitation Act[16] are also directly related to reasonable accommodation. The term reasonable accommodation has been used as well by courts and commentators in the context of removing architectural barriers,[17] modifying designs and operations to make mass transit systems accessible to handicapped people,[18] and captioning television programs for people with hearing impairments.[19]

The case law analyzing handicap discrimination laws and regulations, which the remainder of this chapter discusses, clearly requires some kinds of accommodation, although it employs no clear definition of reasonable accommodation. By accommodation, this body of law appears to mean any modification, aid, device, or service that addresses the abilities of handicapped individuals in order to permit participation in a particular opportunity. In what contexts, for whom, in what ways, and to what extent such accommodations must be made, however, is not completely resolved.

As the preceding chapter explained, there are many equally effective ways of performing tasks and accomplishing objectives. Some recent studies of Federal contractors subject to section 503 indicate that accommodations are frequently minor and inexpensive.[20] A 1980 Ameri-

[11] 20 U.S.C. §1401(17) (1976). The term also includes school health services, social work services in schools, and parent counseling and training.

[12] New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 852-55 (10th Cir. 1982).

[13] See cases cited in chap. 3 in the section entitled "Education for All Handicapped Children Act.".

[14] 34 C.F.R. §104.44 (1982).

[15] 42 U.S.C. §6000-6012 (1976 and Supp. V 1981). See chap. 3 in the section entitled "Developmental Disabilities Assistance and Bill of Rights Act."

[16] 29 U.S.C. §701-796 (1976 and Supp. V 1981).

[17] *E.g.*, Charles D. Goldman, "Architectural Barriers: A Perspective On Progress," to be published in *W. New Eng. L. Rev.*, vol. 5, no. 3 (Winter 1983), pp. 19, 22 of manuscript (hereafter cited as "Architectural Barriers").

[18] Dopico v. Goldschmidt, 687 F.2d 644, 650 (2d Cir. 1982); Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 607 (D.R.I. 1982).

[19] Southern Cal. Community Television v. Gottfried, 103 S.Ct. 885, 891 (1983).

[20] The benefits of accommodation in comparison with their costs are discussed in chap. 7.

can Management Association research study[21] reported the following examples of simple and creative accommodations:

—Assigning handicapped employees to areas that are already accessible instead of altering other areas;

—Replacing knobs on a microfilm viewer with levers so that a cerebral palsied employee can have access to source documents.

—Using rubber stamps instead of conventional templates, so that a computer programmer with severe spasticity can draw logic charts;

—Modifying tape recorder keys so that workers with minimal hand function can use the recorder as a notebook;

—Using a plastic overlay with outlines and windows to help a visually impaired employee read data entry forms;

—Providing protractors, compasses and other equipment that is marked in braille, or providing talking calculators;

—Modifying work schedules.[22]

Further evidence of the ease and low cost of most accommodations[23] appears in a 1982 United States Department of Labor study of accommodations provided for handicapped workers by Federal contractors under section 503 of the Rehabilitation Act.[24] The study estimated that handicapped employees were 3.5 percent of the overall work force of the contractors surveyed.[25] Of these handicapped workers, only 22 percent received some form of accommodation,[26] and these accommodations were generally inexpensive. Half of the accommodations cost nothing, and more than two-thirds cost less than $100.[27] Of the accommodations made, only about 9 percent involved modifying office equipment, such as telephones or typewriters, or providing dictaphones, audiovisual aids, or other special devices.[28] Employers generally reported the accommodations as successful because they allowed handicapped workers to be more productive in their jobs.[29]

Postsecondary institutions have also been able to adjust programs and prac-

[21] Jack R. Ellner and Henry E. Bender, *Hiring The Handicapped* (New York: AMACOM, 1980).

[22] Ibid., pp. 51–52.

[23] Ibid., p. 48. One company saved alteration expenses by installing a paper cup dispenser rather than lowering a water fountain. Ibid., p. 51.

[24] Berkeley Planning Associates, *A Study of Accommodations Provided to Handicapped Employees By Federal Contractors: Final Report* (prepared under a U.S. Dept. of Labor, Employment Standards Administration, contract) (June 1982), vol. 1 (hereafter cited as *Accommodation Study).*

[25] Ibid., p. ii.

[26] Ibid., p. 20. Because the remaining 78 percent of handicapped workers surveyed were employed, it can be assumed that their present positions did not require accommodations.

[27] Ibid., p. 29. As the authors of the study note, it may be that this indicates that employers will only hire those handicapped workers for whom accommodation is unnecessary or inexpensive. Ibid., p. 28.

[28] Ibid., p. 23.

[29] Ibid., p. ii.

tices, frequently with greater ingenuity than expense, to permit handicapped students meaningful opportunities for education after high school. A junior college in Minnesota altered its physical and occupational therapy assistant program to teach visually impaired people. Text material was recorded on audiocassettes, anatomical models were labeled in braille, and examinations and testing procedures were revised to better reflect student achievement better.[30] A community college in Kansas developed for deaf students a series of technical sign language books providing hand signs for technical vocabulary to permit students to work in technical fields.[31] Gallaudet College, established to educate deaf students, has employed a variety of simple devices to promote independent living for its students:

> [The College] installed telephones for the deaf (TDD's) beside all pay phones in college dormitories. . . .All campus offices are equipped with telephones which flash a light in addition to ringing. Dormitories are equipped with flashing doorbell light signals and strobe lights for fire alarms. Persons knocking on any dormitory door can also blink the inside ceiling light with an outside switch. Students who are both blind and deaf greet visitors when they feel a soft breeze created by a fan attached to the doorbell light switch.[32]

Of course not all changes made by programs are going to be inexpensive and easy. These examples only suggest the variety of tasks, methods, and situations the concept of accommodation covers and the many different ways of accomplishing desirable social objectives. The necessity for reasonable accommodation rests finally on the need to consider people's actual abilities and match them with actual program requirements to provide meaningful opportunities.

Southeastern Community College v. Davis: Reasonable Accommodation as Part of Nondiscrimination Law

Analyzing the nature and extent of the duty to accommodate must begin with *Southeastern Community College v. Davis,*[33] the Supreme Court's only extensive opinion on the issue.[34] *Davis* provides some initial definitions for many of section 504's key terms and concepts—"otherwise qualified handicapped individual," "nondiscrimination," and "accommodation"—and shows how they interrelate with individualizing opportunities in a particular factual setting.

Davis, a hearing-impaired[35] licensed practical nurse, sought admission to

[30] S.G. Tickton, W.A. Kinder, and A.S. Foley, *Educational Opportunities For Handicapped Students: 1981 Idea Handbook for Colleges and Universities* (Washington, D.C.: Academy for Educational Development, 1981), p. 21 (hereafter cited as *1981 Idea Handbook).*

[31] Ibid., p. 22.

[32] Ibid., p. 37.

[33] 442 U.S. 397 (1979).

[34] *See also* University of Tex. v. Camenisch, 451 U.S. 390 (1981); Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[35] With an appropriate hearing aid, Davis: "would be able to detect sounds 'almost as well as a person would who has normal hearing.'. . .But this improvement would not mean that she could discriminate among sounds sufficiently to understand normal spoken speech. Her lipreading skills would remain necessary for efective communication. . . ." 442 U.S. at 401.

Southeastern Community College's associate degree nursing program to fulfill eligibility requirements for State certification as a registered nurse. Southeastern rejected her because of her hearing impairment.[36] The college contended that Davis could not safely practice her chosen profession or safely participate in the school's clinical nursing program without extensive modification of the program.[37] Davis contended that Southeastern's insistence on functional ability to hear as an entrance requirement and its refusal to eliminate clinical training as a requirement or to provide individualized assistance by faculty members constituted unlawful discrimination in violation of section 504.

Ruling against Davis, the Supreme Court concluded that Southeastern could impose necessary or essential physical requirements for its nursing program. The Court determined that Davis could not safely participate in the existing clinical nursing program or in many nursing positions[38] and was therefore not an "otherwise qualified handicapped individual" within the meaning of section 504.[39]

Although the higher education and professional context of *Southeastern Community College v. Davis*[40] limited consideration of many reasonable accommodation issues and their interrelationships, the case makes two major contributions. First, the Court's analysis made reasonable accommodation a part of nondiscrimination law. The Court noted that section 504 compels covered institutions to take some actions to remove some restrictions to participation by handicapped people. The Court acknowledged that some requirements and practices,

[36] *Id.* at 400–01.

[37] *Id.* at 401–03.

[38] *Id.* at 407.

[39] The Court held that this statutory language required a person to be "able to meet all of a program's requirements in spite of his [or her] handicap." *Id.* at 406. The Court elaborated:

> Section 504, by its terms does not compel educational institutions to disregard the disabilities of handicapped persons. . . . Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.

Id. at 405. The Court further noted that its interpretation of the meaning of "otherwise qualified" was reinforced by then HEW (now HHS) regulations implementing section 504 that defined "qualified handicapped person": "[w]ith respect to postsecondary and vocational education services, [as] a handicapped person who meets the academic and technical standards requisite to admissions or participation in the [school's] education program or activity. . . ." *Id.* at 406, quoting 45 C.F.R. §84.3(k)(3) (1978). An accompanying HEW analysis noted, as did the Court, that "legitimate physical qualifications may be essential to participation in particular programs." *Id.* at 407 & n. 7, citing 45 C.F.R. pt. 84, app. A, p. 405 (1978).

[40] In areas other than higher education, such as elementary and secondary education, where there is an established right to participate, the *Davis* analysis must be adapted to the demands of the particular context. The section in this chapter entitled "Defining Qualified Handicapped Individuals" discusses how the definition of "otherwise qualified handicapped individual" applies in different contexts; the section entitled "Individualizing Opportunities" discusses how the concept of reasonable accommodation is applied in different contexts; and the section entitled "Limitations Upon the Obligation to Accommodate" discusses the importance of viewing the limitations on the duty to accommodate that *Davis* recognizes within the particular factual setting in which the duty to accommodate arises.

particularly those based on physical requirements,[41] may illegally exclude handicapped people unless they are "legitimate,"[42] "necessary,"[43] and "essential,"[44] and not "arbitrary"[45] or "unreasonable."[46] The Court concluded:

> It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program . . .Thus, situations may arise where *a refusal to modify an existing program* might become unreasonable, and discriminatory[47] (emphasis added).

In placing reasonable accommodation within nondiscrimination law, the Court also sought to distinguish nondiscrimination and accommodation from affirmative action.[48] The difficulties the Court encountered in reconciling handicap antidiscrimination principles with established civil rights understanding of affirmative action are discussed in chapter 7. Regardless of some conflicting language concerning accommodation and affirmative action in its opinion,[49] the Court's analysis places the duty to make reason-

[41] The Court uses the phrase, "physical requirements," in two different senses. In one context, physical requirement refers to selection criteria that correlate with a necessary skill or ability used in performing a task. In the other sense, the Court refers to the necessary skill or ability itself, rather than its correlated proxy. Because the ability to understand spoken speech without lipreading was both a selection criterion and an actual necessary ability, the two concepts could be merged in this case. In other contexts, however, selection criteria and actual required abilities may diverge. It is sometimes necessary to distinguish the issue of who is qualified, i.e., who can actually perform the identified necessary tasks, from whether selection criteria actually reflect those tasks. See the sections entitled "Defining Qualified Handicapped Individuals" and "Exclusionary Classification," below.

[42] 442 U.S. at 407, 413 n. 12; Simon v. St. Louis County, 656 F.2d 316, 320–21 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1981).

[43] 442 U.S. at 407; Simon v. St. Louis County, 656 F.2d 316, 320–21 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1981).

[44] 442 U.S. at 406, citing HEW regulatory interpretation, 45 C.F.R. pt. 84, app. p. 405; 442 U.S. at 407.

[45] 442 U.S. at 412.

[46] *Id.* at 413.

[47] *Id.* at 412–13.

[48] *Id.* at 410–11. The Court referred to the congressional recognition of the distinction between "the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. . . .[N]either the language, purpose, nor history of section 504 reveals an intent to impose an affirmative action obligation on recipients of federal funds." The Court cited sections 501(a) and 503 of the Rehabilitation Act, which specifically require affirmative action to hire and advance qualified handicapped persons, in contrast to 501(c), which encourages but does not require State agencies to do the same. Southeastern Community College was a State institution. *Id.* at 400. The Court may have been analogizing affirmative efforts to increase the number of minority employees to overcome past discrimination with outreach that postsecondary institutions might make to increase enrollment of handicapped students.

[49] Compare *id.* at 410 *with id.* at 412; see chap. 7 in the subsection entitled "Affirmative Action and Nondiscrimination."

able accommodations within the scope of nondiscrimination law.[50]

Second, the Court analyzed reasonable accommodation as the means for matching people with varying abilities to programs with varying requirements. The *Davis* opinion suggests a view of accommodation as a process of individualizing opportunities where possible and reasonable in light of all the circumstances. This view, of course, is explained in the particular context of higher education. Nonetheless, the Court's methodology is instructive. The Court analyzed the nature and requirements of the program, Davis' physical and mental abilities as they related to that program, and whether there was any legally required accommodation that might permit her safe participation in the program.

The underlying purpose of Southeastern's associate degree nursing program, the Court concluded, was "a legitimate academic policy" to train nurses for the wide variety of positions a registered nurse could possibly occupy.[51] It exam-

[50] Expressions of the Court's distinction between affirmative action and nondiscrimination under section 504 occur in *dicta* in other cases. In University of Tex. v. Camenisch, a deaf graduate student had succeeded in obtaining a preliminary injunction to compel the university to find and pay for an interpreter. 616 F.2d 127 (5th Cir. 1980), *vacated as moot*, 451 U.S. 390 (1981). When the case reached the Supreme Court, Camenisch had already received his degree, so the Court ruled the preliminary injunction issue moot. *Id.* at 391-98. In a short concurring statement, the Chief Justice agreed that the Court's opinion did not constitute a ruling on the merits: "The trial court must, among other things, decide whether the Federal regulations at issue, which go beyond the carefully worded *nondiscrimination* provision of Section 504 exceed the powers of the Secretary under Section 504. The Secretary has no authority to rewrite the statutory scheme by means of regulations." *Id.* at 399 (Burger, C.J., concurring) (emphasis in original). The Chief Justice cited to Southeastern Community College v. Davis and Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). In *dicta* in *Pennhurst*, the Court characterized its ruling in *Davis* as follows: "The Court below failed to recognize the well-settled distinction between Congressional 'encouragement' of state programs and the imposition of binding obligations on the States. . . .Relying on that distinction, this Court in Southeastern Community College v. Davis. . .rejected a claim that Section 504. . .obligates schools to take affirmative steps to eliminate problems raised by an applicant's hearing disability. Finding that state agencies such as Southeastern are only 'encourage[d]. . .to adopt and implement such policies and procedures,'. . .we stressed that Congress understood [that] accommodation of the needs of handicapped persons may require affirmative action and knew how to provide for it in those instances where it wished to do so." 451 U.S. at 27.

[51] 442 U.S. at 413 n. 12. By focusing on Southeastern's existing purpose, the Court unnecessarily concentrated on what Davis could not do. An inclusive approach, which starts with what Davis *could* do, would be more consistent with the full participation mandate, which was taken by the Fourth Circuit Court of Appeals. *See id.* at 408 n. 8. Many handicapped people can accomplish some jobs in a given profession but not others. For example, doctors who are totally sightless cannot be surgeons but, with the help of nurses and trained assistants, are practicing general medicine, family medicine, obstetrics and gynecology, pediatrics, internal medicine, physical medicine and rehabilitation, sports medicine, and psychiatry. *See* Spencer B. Lewis, M.D., "The Physically Handicapped Physician," in *The Physician: A Professional Under Stress*, ed. John Callan, M.D. (Norwalk, Conn.: Appleton-Century-Crofts, 1983). The *Davis* court could have asked whether Southeastern could train Davis, given reasonable accommodation to her individual functional limitations, to serve competently as a registered nurse in any of the jobs a registered nurse usually performs. The extent to which her training differed substantially from that of other Southeastern students could be reflected in Davis's degree, with appropriate restrictions placed on her RN license. The Supreme Court, however,

ined the means—a clinical training component and academic courses—for imparting skills to achieve that purpose and concluded that both academic and on-the-job training were required and were the usual modes of instruction.[52] By identifying the essence of the program, its purpose, and the necessary means of achieving its purpose, the Court established qualitative benchmarks for determining the legitimacy of the physical requirements and the availability of accommodations that are reasonable.[53] Based on a limited record, the Court determined that the ability to understand speech other than through lipreading was essential for safe participation in the clinical training program and for many registered nursing positions.[54]

Rather than generalizing about deafness, the Court adopted an individualized approach. It examined the record to ascertain the degree to which Davis' particular hearing impairment affected the necessary functional ability to understand aural communication without lipreading. The Court, however, did generalize about the abilities of deaf people to be nurses. The Court's analysis, therefore, can also be viewed as excluding an entire class of hearing-impaired people from the nursing profession.[55]

Having examined the program and the person, the Court initially concluded that Davis could not safely participate in the existing nursing program. Despite this determination that she did not meet necessary physical requirements, the Court went on to analyze whether there were any accommodations that could permit her safe participation.

Davis had contended that the college could modify its clinical program by waiving certain required courses. The Supreme Court rejected the idea of waiving the clinical component and permitting Davis to take only academic courses because: "[w]hatever benefits [she] might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires."[56]

Alternatively, Davis argued that individual faculty supervision would permit her safe participation in the clinical program. But the Court dismissed this request because section 504's implementing regulations also explicitly reject the kind of personal assistance Davis re-

explicitly rejected this approach. 442 U.S. at 413 & n. 12.

[52] 442 U.S. 401-02; 409-10; 413.

[53] The importance of these benchmarks for determining the extent of the duty to accommodate is discussed in this chapter in the section entitled "Limitations Upon the Obligation to Accommodate."

[54] 442 U.S. at 407.

[55] The validity of such blanket exclusions are discussed in the section entitled "Exclusionary Classifications," below. The record in the district court apparently contained no evidence that hearing-impaired persons can work safely as nurses, although such evidence is available. In 1976, for example, a Civil Service Commission survey indicated that 150 hearing-disabled persons were working as nurses for the Federal Government. For further statistics on the numbers of nurses practicing their profession despite a severe or total hearing loss, *see* Note, "Accommodating the Handicapped: Rehabilitating Section 504 After *Southeastern*," *Colum. L. Rev.*, vol. 80 (1980), pp. 171, 190, n. 131.

[56] 442 U.S. at 410.

quired in order to participate safely in the clinical program. Although they do mandate the provision of auxiliary aids, specifically including interpreters for the deaf, the regulations make optional the provision of attendants and other "services of a personalized nature."[57] In effect, the Court concluded that there were no accommodations that the law could require that would enable Davis to participate safely in the nursing program.

In *dicta*, the Court suggested the outer boundaries of the duty to accommodate. These limitations have been the focus of much attention by the courts and regulators and have caused considerable confusion.[58] According to the Court, a "fundamental alteration in the nature of a program" is not required.[59] This qualitative restriction makes unnecessary modifications that run the risk of affecting the program's essence. The Court also suggested that accommodations could not be required if they would result in "undue financial and administrative burdens."[60] While protecting a program's essential components, these quantitative restrictions also acknowledge that some administrative alterations and some costs are clearly within the scope of the duty to accommodate. Finally, the opinion implies other substantive limitations by the "reasonable" limitation to accommodations, such as considerations of safety and the degree to which personalized services may be required. As was noted earlier, however, the *Davis* decision did not discuss this reasonableness issue because the Court concluded that Davis could not benefit from any accommodation that section 504 required.[61] The Court's analysis compelled it to conclude that Davis was not otherwise qualified, with or without accommodation, to participate in Southeastern's associate degree nursing program.

Davis has spawned some disagreement in lower courts about aspects of the duty to accommodate in employment, education, and transportation. Some of the divergence in analysis flows from conflicting views over how the *Davis* holding should be interpreted in different factual settings.

Southeastern Community College was a State educational institution whose nursing program offered academic courses as well as supervised experience working with patients.[62] Consequently, two of the Court's major concerns were maintaining academic standards[63] and

[57] *Id.* at 408, n. 9, citing 45 C.F.R. §84.44(d)(2) (1978). Southeastern could voluntarily make such an accommodation if it wished to do so. *Davis* sets the limits of what nondiscrimination law *requires* in the way of accommodation.

[58] The limitations on the duty to accommodate are analyzed in this chapter in the section entitled "Limitations Upon the Obligation to Accommodate."

[59] 442 U.S. at 410. The Court also said that "substantial modifications" were not required by section 504. *Id.* at 405, 411 n. 10 ("substantial changes"), 413. These restrictions on the duty to accommodate are equivalent.

[60] *Id.* at 412.

[61] *See* Camenisch v. University of Tex., 616 F.2d 127, 133 (5th Cir. 1980), *vacated as moot*, 451 U.S. 390 (1981); Majors v. Housing Auth. of DeKalb County, Ga., 652 F.2d 454, 457, 458 (5th Cir. 1981); Tatro v. State of Tex., 625 F.2d 557 (5th Cir. 1980).

[62] 442 U.S. at 400–03.

[63] *E.g., id.* at 410, 413. *See also* New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 852 (10th Cir. 1982); Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 180–81, 183–84 (7th Cir. 1983)

avoiding harm to third parties.[64] These concerns informed *Davis'* holding that a school need not ignore necessary physical ability requirements, lower its admissions standards, or make such fundamental alterations in its program that its legitimate academic purpose cannot be achieved. As succeeding sections of this chapter detail, the *Davis* holdings should be applied in light of the societal area and the particular facts involved in each case.

Another source of differing analysis stems from the difficulty in fashioning precise legal standards governing reasonable accommodation. In viewing accommodation as matching people to programs by individualizing opportunities, succeeding sections of this chapter suggest a useful framework in which to understand existing law and regulations and the complex interplay of issues surrounding reasonable accommodation.

Defining Qualified Handicapped Individuals

An initial question arising in regard to legal standards that govern reasonable accommodation is to whom must a reasonable accommodation be made? Sections 501, 503, and 504 of the Rehabilitation Act apply only to a particular class of handicapped people[65] —those who are "otherwise qualified."[66] Ascertaining who is qualified, therefore, is extremely important.[67] Determining who is a "qualified handicapped individual" is a complex issue because qualified has two distinct but interrelated legal meanings.

Stated Qualifications

In one sense, qualified refers to meeting selection criteria. Some programs, such as those in employment and postsecondary education, limit eligibility to a select group of the public. To narrow the field of potential beneficiaries or participants, compliance with admission or selection criteria is made a condition of

> The Department believes that the omission of the word "otherwise" [from the regulation's definition of "qualified handicapped individual"] is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all of the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.
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> Southeastern Community College v. Davis, 442 U.S. at 407, n. 7, citing 45 C.F.R. pt. 84, app. A, p. 405 (1978).

[64] *See* Southeastern Community College v. Davis, 442 U.S. at 401; Doe v. New York Univ., 666 F.2d 761, 775 (2d Cir. 1981); Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 606 (D.R.I. 1982).

[65] The definition of handicapped is discussed in chap. 1 in the section entitled "Defining 'Handicaps'." Although the definition of handicap may not be problem free, it does not present difficult issues with respect to reasonable accommodation.

[66] 29 U.S.C. §794 (Supp. V 1981). The statutory language appears somewhat redundant because it prohibits discrimination "solely by reason of his handicap." The limitation of protection to "otherwise qualified" appears unnecessary. If a handicapped person is denied an opportunity because he or she is not qualified, the discrimination is not "solely on the basis of [his or her] handicap." To have been discriminated against, one must *ipso facto* be qualified.

[67] Both the *Davis* decision and the HEW regulations construe "otherwise qualified" to be the equivalent of "qualified." The explanatory note following the regulations explains:

participation in the program. These required qualifications generally fall into three categories: academic standards, such as a high school or college diploma or a degree in a particular discipline; technical or experiential credentials, such as 5 years of teaching experience or training in data processing; or explicit performance standards, such as the ability to lift 40 pounds or to translate a foreign language. To the extent that selection or admission criteria involve measurements of physical or mental "irregularities" or ability, they may wholly or disproportionately exclude handicapped people. When a program is selective and excludes a person on the basis of a handicap, the first question that arises is whether the qualifications standards are legitimate, that is, whether they are sufficiently related to the program or activity in question. The legitimacy of qualifications standards is discussed in this chapter in the section entitled "Exclusionary Classifications."

Stated qualifications are not, as one might expect, however, the sole determinant of who is and who is not qualified. Indeed, in certain circumstances, a handicapped person who does not satisfy legitimate selection criteria may still be qualified. This situation occurs because the law focuses on a second meaning of qualified.

Essential Functions and Capability of Benefiting

In its second sense, qualified is an ability standard independent from selection criteria. Qualified in this context means ability to perform or participate after considering the availability of a reasonable accommodation. The issue is whether the handicapped person is able to perform or participate in the program. Some handicapped people will be able to participate or perform without any reasonable accommodation; others will need an accommodation in order to participate; still others will be unable to participate even with accommodation.

In contexts like education and housing, one standard for analyzing whether a person is qualified is that the person must be "capable of benefiting" from the program.[88] A more common standard is the ability to perform "essential functions."

The sections 504 and 501 regulations have generally adopted the approach that handicapped persons must meet essential program participation or admission requirements in order to be considered legally "qualified." The HEW (now HHS) regulations also adopt the "essential requirements" approach with respect to education[89] and other federal-

[88] Camenisch v. University of Tex., 616 F.2d 127, 133 (5th Cir. 1980), *vacated as moot,* 451 U.S. 390 (1981); Majors v. Housing Auth. of DeKalb County, Ga., 652 F.2d 454, 457, 458 (5th Cir. 1981) (mental patient who required a dog in order to live alone was capable of benefiting from public housing); Tatro v. State of Tex., 625 F.2d 557, 563, 564 (5th Cir. 1980) (provision of clean intermittent catheterization to school girl rendered her capable of benefiting from regular classroom instruction). *See also* Garrity v. Galen, 522 F. Supp 171, 214–15 (D.N.H. 1981) (mentally retarded residents of State school discriminated against on generalized assumption that they were not able to benefit from certain programs and activities).

[89] 45 C.F.R. §84.3(k)(3) (1982). *See* discussion of Southeastern Community College v. Davis in the preceding section. With respect to public preschool, elementary, secondary, or adult education, the regulations define qualified in terms of

ly funded services.[70] Similarly, the Department of Justice government-wide section 504 coordinating regulations define a qualified handicapped person, with respect to employment, as one who can perform the essential functions of the job with reasonable accommodation or, with respect to services, as one who meets the essential eligibility requirements for receiving such services.[71]

One notable exception to this essential function definition of qualified occurs in the section 503 regulations, which define a qualified handicapped individual as one "who is capable of performing a particular job, with reasonable accommodation to his or her handicap."[72] Because the reasonable accommodation requirement is broadly stated,[73] however, it would appear to include paring job requirements down to their essential components.[74]

The analysis of ability to benefit and to perform essential functions applies in various contexts, including situations where there are no stated qualifications whatever. Because some programs are not selective and are intended to be open to the general public, such as public mass transit[75] or public elementary and secondary education,[76] there may not be any stated qualifications. Nonetheless, under such programs there may still be a determination whether particular handicapped people are able to benefit or perform essential functions.

Such analysis makes it possible that a handicapped person not satisfying legitimate selection criteria may still be able to be a qualified handicapped person by

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age at which such educational services are provided to the nonhandicapped, are mandatory, or are required by the Education of All Handicapped Children Act. *Id.* at §84.3(k)(2).

[70] *Id.* at §84.3(k)(4) (1982).

[71] 28 C.F.R. §41.32 (1982).

[72] 41 C.F.R. §60-741.2 (1982).

[73] Although reasonable accommodation is not defined, Federal contractors are obligated to make reasonable accommodations unless an accommodation would result in an undue hardship. 41 C.F.R. §60-741.5(d) (1982). In addition, they must ensure that their physical and mental job requirements are "job related and are consistent with business necessity and the safe performance of the job." *Id.* at 60-741.5(c).

[74] HEW reached the same conclusion. The original commentary to the HEW (now HHS) section 504 regulation notes:

> The term "essential functions" does not appear in the corresponding provision in the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person would be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in peforming tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition. 45 C.F.R. pt. 84, app. A, subpt. A, no. 5, p. 296 (1982).

[75] As one court has put it, "There simply are no qualifications to ride a bus." Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 606 (1982).

[76] Almost every State requires universal, compulsory education for children between certain specified ages. About half the States have constitutional provisions that require a public education system to be "equally available to all." Marcia P. Burgdorf and Robert Burgdorf, Jr., "A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause," *Santa Clara L. Rev.*, vol. 15 (1975), p. 868 (hereafter cited as "A History of Unequal Treatment"). *But see* Ala. Const. Amend. 111, §256 (although there is no "right" to education, Alabama's policy is to "foster and promote" the education of its citizens in a manner and extent consistent with its available resources).

demonstrating an ability to perform essential program functions.

In *Prewitt v. U.S. Postal Service,*[77] a veteran was rejected for a clerk-carrier position because he had limited movement in his left shoulder.[78] The medical standards for the job of clerk-carrier in the postal service specified that applicants for the position must "meet a wide range of physical criteria, including, *inter alia,* the ability to see, hear, lift heavy weights, carry moderate weights, reach above shoulder and use fingers and both hands."[79] Prewitt had, however, previously performed competently in a postal service position requiring similar physical functional ability and his physical condition had not significantly altered during the intervening years.[80]

The Fifth Circuit Court of Appeals ruled that, in examining selection criteria, the:

> test is whether a handicapped person who meets all employment criteria except for the challenged discriminatory criterion "can perform the essential functions of the position in question without endangering the health and safety of the individual or others." If the individual can so perform, he must not be subjected to discrimination.[81]

The court stated that the issue was either whether Prewitt could in fact perform in the clerk-carrier position, despite the physical ability criteria, or whether he could perform the job with a reasonable accommodation regardless of the criterion.[82]

Role of Accommodations in Determining Who Is Qualified

Reasonable accommodation may have a major effect on the determination of whether the handicapped person is capable of meeting the essential requirements or is capable of benefiting from the program. Because accommodations may ameliorate the effect of functional limitations and eliminate unnecessary barriers to participation, becoming a qualified handicapped person may hinge on whether available accommodations are provided. Because the availability of accommodations almost invariably increases the pool of people who are qualified, the link between the two concepts is of crucial importance.

This linkage between qualification and accommodation is accomplished in two different ways in the Federal regulations. All Federal regulations define qualified in the employment context to include consideration of available reasonable accommodation.[83] In nonemployment situations, the regulations require

[77] 662 F.2d 292 (5th Cir. 1981).

[78] *Id.* at 298–99.

[79] *Id.* at 298.

[80] *Id.* at 297.

[81] *Id.* at 307 (quoting 28 C.F.R. §§1613.702(f), 1613.703). The court also stated that if a reasonable accommodation exists that would permit the plaintiff to perform the essential duties of the job, he should also be considered qualified. 662 F.2d at 307–10.

[82] 662 F.2d at 309–10.

[83] 28 C.F.R. §41.32 (1982); 45 C.F.R. §84.3(k)(1) (1982); 29 C.F.R. §1613.702(f) (1982); 41 C.F.R. §60–741.2 (1982); Prewitt v. United States Postal Service, 662 F.2d 292, 309–10 (5th Cir. 1981); Bey v. Bolger, 540 F. Supp. 910, 924–26 (E.D. Pa. 1982). However, the determination of whether a reasonable accommodation exists that would render a handicapped person qualified need only occur after the handicapped person has satisfied all of the other qualifications except the impairment-related qualification. 45 C.F.R. §84.12(a);

modifications in specified program tasks or activities or the provision of auxiliary services or aids to enable participation by handicapped people who could meet the "essential" requirements.[84] Courts have frequently ignored these different ways of linking qualification to accommodation and simply assessed the qualifications of handicapped people in light of potential accommodations.[85]

Having addressed what makes a handicapped person qualified, it is necessary also to indicate what it means to be unqualified. A handicapped person is unqualified if, after taking into account the rendering of reasonable accommodation, the individual is not capable of benefiting from the program, performing the essential functions, or meeting essential eligibility requirements. Thus, in *Southeastern Community College v. Davis,* the Court ruled that Davis was not qualified because she could not meet the college's legitimate physical requirement of ability to understand speech without lipreading, and no accommodation existed that would permit her to benefit from the program.

There appears to be some circularity in the concept and application of "otherwise qualified." Whether a person is qualified is a threshold issue that must be resolved before the individual can invoke the antidiscrimination statutes. A person who is not otherwise qualified is not covered by, for example, section 504. To determine whether a person is qualified, however, there must be an examination of essential program functions, the person's abilities, and possible accommodations—some of the ultimate legal considerations that may establish unlawful discrimination. The threshold question—whether a person is covered by the nondiscrimination provision—is answered only after extensive analysis that assumes coverage. As the *Davis* ruling illustrates, the decision in such a case may be a determination that the person is not qualified, as opposed to a finding that the person was qualified but was not discriminated against.

Individualizing Opportunities

Individualization is a key orienting legal principle in handicap nondiscrimination law. A case-by-case examination of functional abilities in an identified setting and an analysis of available accommodations to match a particular person to a particular activity is the core of this requirement.[86] Application of the individualization principle produces differing legal standards in different socie-

Upshur v. Love, 474 F. Supp. 332, 341-42 (N.D. Cal. 1979). Specifically, courts have construed "qualified" in employment to mean the meeting of all of the qualifications of a particular position *except* the qualifications that cannot be met due to a physical impairment, Prewitt v. United States Postal Service, 662 F.2d 292, 309-10 (5th Cir. 1981); Bey v. Bolger, 540 F. Supp. 910, 924-26 (E.D. Pa. 1982), but only if the handicapped person can also make some showing that the physical standard is either not job related or might be met by some form of reasonable accommodation. *Id.* This delineation of qualification does not conflict with the Supreme Court's interpretation in *Davis,* but merely attempts to allocate the burden of proof to the employer once the issue has been raised concerning the validity of the standard or the availability of accommodation.

[84] See the section entitled "What Is Reasonable Accommodation?" above.

[85] Majors v. Housing Auth. of DeKalb County, Ga., 652 F.2d 454, 457, 458 (5th Cir. 1981); Tatro v. State of Tex., 625 F.2d 557, 563-64 (5th Cir. 1980).

[86] See generally chap. 5 and the section entitled "Legal Implications of the Spectrum and Social Contact Principles" therein.

tal areas, such as elementary and secondary education, higher education, and employment, in order to reflect their varying concerns and circumstances. That different settings require variations in a central legal concept has been recognized within other areas of law. Statutory prohibitions against racial discrimination, for example, frequently use an "effects test"[87] to define liability, but the precise standards for the test vary in, for example, voting,[88] employment,[89] and Federal financial assistance[90] because of the different contexts. The principle that statutory standards vary with particular circumstances has also been recognized with respect to individualization required by section 504.[91]

Elementary and secondary education, higher education, and employment are the three areas in which the courts and regulators have consistently interpreted handicap discrimination laws to require tailoring opportunities to individuals.[92] Each area, however, has its own particular concerns leading to somewhat different standards.

A free, appropriate, public elementary and secondary education that meets the individual needs of handicapped children is guaranteed by section 504 of the Rehabilitation Act, the Education for All Handicapped Children Act (EAHCA), and the United States Constitution.[93] Consequently, the obligation to make accommodations to provide meaningful

[87] The effects test and its rationale have been explained as follows:

> Because discrimination can be either intended or unintended, civil rights law has two markedly different legal standards for determining when illegal discrimination has occurred. Constitutional guarantees of equal protection of the laws, contained in the 5th and 14th amendments, are violated only by intentional, purposeful, or deliberate actions that harm persons because of their race, national origin, or sex. Various laws, however,. . .forbid actions, regardless of their intent, that have a disproportionate effect on the basis of race, national origin, and sex and that cannot be justified by any legitimate reason.

U.S., Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* (1981), p. 16 (footnotes omitted) (hereafter cited as *Affirmative Action Statement).*

[88] *See* 42 U.S.C.A. §1973 (1981 & Supp. 1983); D. Cardwell, "Voter Dilution and the Standard of Proof," *Urban Lawyer,* vol. 14 (Fall 1982), p. 863; Note, "Amending Section 2 of the Voting Rights Act of 1965," *Case W. Res. L. Rev.,* vol. 32 (1982), p. 500.

[89] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–36 (1971); *Affirmative Action Statement,* pp. 17–18.

[90] *See* Lau v. Nichols, 414 U.S. 563, 566–68 (1974). *Cf.* Charles F. Abernathy, "Title VI and the Constitution: A Regulatory Model For Defining Discrimination," *Geo. L.J.,* vol. 70 (1981), p. 1.

[91] Jose P. v. Ambach, 557 F. Supp. 1230, 1235 (E.D. N.Y. 1983).

[92] The regulations also require accommodations in other areas, such as in the delivery of health and social welfare benefits. 45 C.F.R. §84.52 (1982). These requirements have not yet been the subject of much litigation or amplification by regulators. A recipient that provides notice of benefits or services, or written material concerning waivers of rights and consent to treatment, must "take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap." *Id.* at §84.52(b). The regulations also require effective provision of emergency medical care to hearing-impaired persons, which may include the assistance of interpreters. *Id.* at §84.52(c).

[93] *See* 34 C.F.R. 104.33 (1982); Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 102 S.Ct. 3034, 3041–47 (1982); and chap. 3 in the sections entitled "Education for All Handicapped Children Act" and "Constitutional Protections for Handicapped Persons."

and equal opportunity is stronger in elementary and secondary education than in other areas where the entitlement is less clear or does not exist.

Litigation under EAHCA is usually coupled with claims for similar individualized education programs under section 504. The courts and, to a certain extent, the section 504 regulations have supported the wide range of diagnostic, evaluative, instructional, and medical services spelled out by EAHCA.[94] Education Department regulations require that where an educational placement is required in a program not operated by the agency receiving Federal education funds, adequate transportation may have to be provided to and from the location of the placement.[95] Similarly, school districts may be required to furnish or pay for residential placement of handicapped children if that is appropriate.[96] In addition, courts have required school districts to provide and pay for counseling[97] and some medical services, such as clean instrument catheterization.[98] Mentally retarded students also have been held to be entitled to more than the regular 180 days of school per year, where that was found necessary to provide meaningful education,[99] and to field trips and other supervised recreational activities.[100] Finally, school districts have been required to modify their tests and testing procedures to ensure that they fairly test ability or achievement and not a disability.[101]

Unlike elementary and secondary education, there is no right to enrollment in college or a vocational training program, per se. Admission to higher education programs raises threshold issues of merit and competition that are not a factor at earlier levels of schooling. Consequently, the right to individualized opportunity in higher education, although extensive, is not as sweeping.

Federal regulations require institutions of higher education receiving Federal financial assistance to make academic adjustments[102] to the needs of handicapped students, permitting, for example, a deaf college student to meet an arts requirement by substituting an art course for a music appreciation course.[103] They also mandate that colleges and universities provide auxiliary aids,[104] such as taped texts for the visually impaired and interpreters for deaf students.[105] Admissions testing[106] and course examinations[107] must be modified to assess a student's ability or achievement rather than his or her functional impairment.

In *Camenisch v. University of Texas*,[108] a deaf graduate student, already enrolled

[94] *See* 20 U.S.C. §1401(17) (1976) for the listing of "special education and related services" required by the EAHCA, discussed in this chapter in the section entitled "What Is Reasonable Accommodation?"

[95] 34 C.F.R. §104.33(c)(2) (1982).

[96] *Id.* at §104.33(c)(3) (1982).

[97] Gary B. v. Cornin, 542 F. Supp. 102,111 (N.D. Ill. 1981).

[98] Taro v. State of Tex., 625 F.2d 557, 562–63 (5th Cir. 1981).

[99] Georgia Ass'n of Retarded Children v. McDaniel, 511 F. Supp. 1263, 1278 (N.D. Ga. 1981).

[100] Garrity v. Galen, 522 F. Supp. 170, 187–88 (D.N.H. 1981).

[101] Brookhart v. Illinois Dep't of Educ., 697 F.2d 179, 184 (7th Cir. 1983).

[102] 34 C.F.R. §104.44 (1982).

[103] 45 C.F.R. pt. 84, app. A., subpt. E, no. 31, p. 308 (1982).

[104] 34 C.F.R. §104.44(d)(1) and (2) (1982).

[105] *Id.* §104.44(d)(2) (1982).

[106] *Id.* §104.42(b)(3) (1982).

[107] *Id.* §104.44(c) (1982).

in a master's degree program, obtained a preliminary injunction ordering the university to procure and finance a sign language interpreter to permit the student to complete a particular course. The Seventh Circuit recently affirmed a district court order requiring the Illinois Department of Rehabilitation Services to pay the cost of a sign language interpreter for a deaf student at the Illinois Institute of Technology.[109]

Employment also presents issues of merit and competition. Handicapped people are entitled to have their individual abilities considered by an employer[110] in light of available reasonable accommodations. But no handicapped person is entitled to a particular job; nondiscrimination merely means that handicapped people may not be rejected solely because of their handicaps. Because the employer must benefit from the employee's work, reasonable accommodation in the employment context must permit the meeting of the employer's essential needs as well as allowing the employee to compete.

Reasonable accommodation was defined by example in Federal regulations as including job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, provision of readers or interpreters, and modifications that make the workplace accessible. The language of the regulations makes clear that these examples do not describe all possible accommodations.

Although reasonable accommodation originated in employment regulations, only four cases arising under section 501 of the Rehabilitation Act have analyzed the issue. In *Crane v. Lewis*,[111] a district court ordered the Federal Aviation Administration to determine whether a hearing-impaired applicant could perform the essential job function of using the telephone with a hearing aid. In *Stutts v. Freeman*,[112] a court of appeals ordered the Tennessee Valley Authority to implement an alternative means of administering a written standardized employment test to an applicant with dyslexia. In *Prewitt v. U.S. Postal Service*,[113] another court of appeals required a district court to consider on remand whether an accommodation, such as lowering shelving, would permit an applicant with limited upper arm movement to perform essential duties. In *Bey v. Bolger*,[114] however, a district court refused to order the postal service to hire

[108] Camenisch v. University of Tex., 616 F.2d 127, 133 (5th Cir. 1980), *vacated as moot*, 451 U.S. 390 (1981). *See also* Crawford v. University of N.C., 440 F. Supp. 1047, 1059 (M.D. N.C. 1977). *See also* Barnes v. Converse College, 436 F. Supp. 635, 637 (D.S.C. 1977).

[109] Jones v. Illinois Dep't of Rehabilitation Services, 689 F.2d 724, 729–30 (7th Cir. 1982). Such services were also required in vocational rehabilitation service agencies for a class of handicapped college students. Schornstein v. New Jersey Div. of Vocational Rehabilitation Services, 519 F. Supp. 773, 780 (D.N.J. 1981), *aff'd mem.*, 688 F.2d 824 (3d Cir. 1982).

[110] 28 C.F.R. §4153 (1982); 45 C.F.R. §84.12(a) (1982); 29 C.F.R. §1613.704(a) (1982); 41 C.F.R. §60-741.5(d) (1982). *Cf.* Coleman v. Darden, 595 F.2d 533, 536–37 (9th Cir. 1979), *cert. denied*, 444 U.S. 927 (1979). Recently, in upholding the constitutionality of the extension of the Age Discrimination in Employment Act to State and local government employees, the U.S. Supreme Court ruled that the act required the State of Wyoming to determine ability to perform jobs "in a more individualized and careful manner." Wyoming v. EEOC, 103 S.Ct. 1054, 1062 (1983).

[111] 551 F. Supp. 27, 31–32 (D.D.C. 1982).

[112] 694 F.2d 666, 668–69 (11th Cir. 1983).

[113] 662 F.2d 292, 305, 309, n. 23 (5th Cir. 1981).

[114] 540 F. Supp. 910, 926 (E.D. Pa. 1982).

an applicant with extremely high blood pressure and give him a light-duty work schedule.

Providing Equivalent Opportunities

The objective of reasonable accommodation is to provide each individual with a "meaningful opportunity" to participate. Equivalent opportunity, a qualitative legal standard derived from the meaningful opportunity mandate, provides a guide to the appropriateness of an accommodation. The concept of equivalent opportunity, as extrapolated from a still-developing body of regulatory and case law, is a statement of the overall goal to produce full participation. It is also a comparative standard for measuring the opportunity for participation provided to handicapped persons in relation to the opportunity provided to others. By its nature, equivalence is not a fixed standard; it varies with the particular situation and the nature of the rights being asserted.

Under Department of Justice government-wide section 504 regulations, it is discriminatory to provide an aid, benefit, or service "that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others."[115] The original HEW (now HHS) regulations implementing section 504 use essentially the same wording and state further that to be equally effective an aid, benefit, or service is "not required to produce the identical result or level of achievement."[116] The explanatory appendix following the regulations expounds on the concept as follows:

> [T]he term "equally effective,". . .is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under Title VI of the Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. *See Lau v. Nichols*. . . .[117]

The concept of equivalent opportunity was further amplified in *Garrity v. Gallen*, where a Federal court was confronted with a challenge to inadequate education, training, and conditions at a New Hampshire institution for mentally retarded persons. The court commented:

> The pattern of excluding entire categories of retarded residents, such as

[115] 28 C.F.R. §41.51(b)(1)(iii) (1982). Similar language is contained in the HHS section 504 regulations. 45 C.F.R. §84.4(b)(1)(ii) & (b)(2) (1982).

[116] 45 C.F.R. §84.4(b)(2) (1982).

[117] 45 C.F.R. pt. 84, app. A., p. 297 (1982). *See also* Lau v. Nichols, 414 U.S. 563 (1974) and chap. 5 in the section entitled "Legal Implications of the Spectrum and Social Contact Principles."

> the profoundly mentally retarded and the multiple handicapped, from entire categories of services and activities (e.g. [education and training], recreational trips off campus, etc.), without first accommodating them with appropriate auxiliary aids and without then making an individualized determination of their ability to participate, must cease. . . .Laconia State School (LSS) need not make each of its existing facilities or every [part] of an existing facility accessible to or usable by all handicapped persons; nevertheless, all of the programs and activities at LSS, *when viewed in their entirety,* must be readily accessible to all handicapped persons. . . .LSS cannot, therefore, absolutely deny certain services to individuals without providing them equivalent services. For example, profoundly retarded residents must be afforded [education and training] services to the same extent as mildly retarded residents even though the teaching methods might be different.[118]

The equivalence standard encompasses a continuum of levels of equality by which accommodations may be judged. At one end are accommodations that permit handicapped people to participate fully and identically in opportunities provided others. For example, a telephone amplification device might permit a hearing-impaired person to perform all of the duties of a telephone operator. At the other extreme are opportunities that provide some degree of roughly comparable benefit, such as those provided by some education and training programs for mentally retarded persons. Equivalence may also be achieved by accommodations that permit a handicapped person to perform "essential functions" or meet "essential eligibility requirements" of a program or activity instead of equal participation in all incidental facets of a program or activity.[119]

Equivalence varies according to what accommodations are possible and reasonable. Where a change in some rule or policy or the rendering of a reasonable accommodation can produce identical treatment and identical results for qualified handicapped persons, equivalence may require such identical treatment.[120] Where identical treatment is not appropriate, equivalence requires reasonable accommodation to produce equally effective participation with commensurate results. And in some circumstances, where neither of the prior levels is possible or appropriate, equivalence may

[118] 522 F. Supp. at 217; 45 C.F.R. §84.22(a) (1982). Equivalence is also embodied in section 504 regulations requiring architectural accessibility. 28 C.F.R. §41.57(a) (1982).

[119] See this chapter under the section entitled "Incidental-Essential Distinction."

[120] Even where possible, identical treatment is not always required by the law if it would require changes in the essence of a program, require massive modifications, or be too costly. See the section in this chapter entitled "Limitations Upon the Obligation to Accommodate." *See also* Board of Educ. v. Rowley, 102 S.Ct. 3034, 3042–43 (1982). The degree of equivalence beyond that which is minimally required may frequently be a matter at the discretion of the program. Robert A Maroldo, Jr., "MSPB Review of Handicap Discrimination Cases," *Federal Merit Systems Reporter Perspective,* vol. 82, no. 6 (July 1982), pp. V38–39; cf. Espino v. Bestiero, 520 F. Supp. 905, 911–13 (S.D. Tex. 1981).

consist of a roughly comparable opportunity.

Equal opportunity for handicapped people has many meanings depending upon the capabilities of the people, the program or activities in which they wish to participate, and the existing resources. The concept of equivalence recognizes that fact and acts as a benchmark by which the need for and effectiveness of accommodations in particular circumstances may be judged.

Limitations Upon the Obligation to Accommodate

The legal requirements of nondiscrimination and reasonable accommodation are limited. These limitations reflect the compromise struck between the one extreme of completely ignoring that society is primarily structured for people whose abilities fall in the normal range and the other extreme of doing everything possible, no matter how costly or drastic, to permit full participation.

Incidental-Essential Distinction

Limitations on the duty to accommodate flow from the central concept that essential program components are to be preserved. The Supreme Court recognized this principle in *Southeastern Community College v. Davis*. As noted earlier in this chapter, the Court referred to program components and requirements in terms such as essential, necessary, and legitimate to determine the reasonableness of Davis's requests for accommodation. The implication of the Court's analysis is that some program functions and program requirements are essential, while others may be only incidental. The incidental-essential distinction is also consistent with the premise that there are frequently equally effective ways in which tasks and activities may be restructured to achieve similar objectives.[121]

Program components or tasks that are incidental may logically be waived or altered to allow a handicapped person to participate unless such modifications run afoul of other restrictions placed on the duty to make accommodations. Essential components or tasks, however, must be preserved, and only accommodations that permit their performance may be legally required.

Determining what aspects of a program are essential and what aspects are incidental is not always easy. Accommodations that imperil the viability of a program certainly interfere with one or more essential elements, as do accommodations that alter the central program purpose. The Court in *Davis* used this distinction between the essential and the incidental to suggest both quantitative and qualitative limitations on the duty to make accommodation.

Davis prohibited requiring "fundamental alterations" in the nature of a program and "undue financial and administrative burdens" in order to preserve the viability and achievement of program objectives. There has been little judicial discussion of undue administrative burdens imposed by accommoda-

[121] See chap. 5 in the section entitled "The Role of Social Context." The incidental-essence distinction has also been made with reference to making mass transit accessible to handicapped people. *See* Dopico v. Goldschmidt, 687 F.2d 644, 653 (2d Cir. 1982).

tions. Undue financial burdens are discussed below as a cost consideration.[122] The issue of fundamental alterations has, however, been the subject of much litigation.

Fundamental Alterations Not Required

Davis and subsequent decisions make clear that neither fundamental alterations,[123] "massive" changes,[124] nor "substantial modifications"[125] are required by section 504. Such changes in a program would inevitably change its nature; section 504 does not require alterations that endanger a program's viability[126] or "jeopardize its effectiveness."[127] Excluding fundamental alterations from the scope of the reasonable accommodation requirement ensures that the program or activity may achieve the benefits it is intended to achieve.[128] Nondiscrimination also does not require such substantial modifications as would, in effect, create a new program.[129]

Cost Limitations

In passing the Rehabilitation Act of 1973, Congress explicitly recognized that accommodations to avoid discrimination might involve some compliance costs and established limited programs to help bear them. Section 302 of the Rehabilitation Act authorizes grants to State units to provide "such information and technical assistance [including support personnel such as interpreters for the deaf] as may be necessary to assist those entities in complying with this chapter [of the Act], particularly of Section 794 of this title."[130]

The issue of cost limitations has proven particularly difficult with respect to handicap antidiscrimination law. One element of confusion is added by the failure to distinguish between cost as a limitation on legal rights and cost as a

[122] The analysis of administrative burdens concerns the elimination of certain categorical disability classifications contained in statutes and regulations that exclude handicapped people as a class on the basis of their disabilities. See this chapter in the section entitled "Exclusionary Classification" and Costner v. United States, 555 F. Supp. 146, 150 (E.D. Mo. 1982). *See also* Weinberger v. Salfi, 422 U.S. 749 (1975).

[123] Southeastern Community College v. Davis, 442 U.S. at 410.

[124] Dopico v. Goldschmidt, 687 F.2d 644, 653 (2d Cir. 1982); American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272, 1278 (D.C. Cir. 1981).

[125] Southeastern Community College v. Davis, 442 U.S. at 405, 411 n. 10 ("substantial changes"), 413.

[126] New Mexico Ass'n of Retarded Citizens v. State of N.M., 678 F.2d 847, 855 (10th Cir. 1982). One commentator has suggested that a "program impairment" standard be adopted to measure the limits of the duty to accommodate. Note, "Accommodating the Handicapped: The Meaning of Discrimination Under Section 504," *N.Y.U. L. Rev.*, vol. 55 (1980), pp. 881, 900–02.

[127] Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 611 (D.R.I. 1982).

[128] Southeastern Community College v. Davis, 442 U.S. at 413.

[129] Doe v. Colautti, 592 F.2d 704, 707–09 (3rd Cir. 1979); Turillo v. Tyson, 535 F. Supp. 577, 587 (D.R.I. 1982); Lynch v. Maher, 507 F. Supp. 1268, 1280 (D. Conn. 1981); Colin K. v. Schmidt, 536 F. Supp. 1375, 1388 (D.R.I 1982); Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 607 (D.R.I. 1982)

[130] 29 U.S.C. §775(a)(2) (Supp. V 1981). In referring to this section, the Supreme Court commented in *Davis* that "this provision recognizes that on occasion the elimination of discrimination might involve some costs. . . ." 442 U.S. at 411 n. 10. In addition, section 506 authorizes some financial assistance for the removal of architectural, transportation, and communication barriers for certain programs. 29 U.S.C. §794b (Supp. V 1981).

consideration in choosing among effective remedies.

Civil rights protections generally are not limited by cost considerations. For example, segregated public schools are unlawful and one is entitled to a remedy that eliminates all vestiges of a dual school system.[131] Similarly, all handicapped children have a right to a free appropriate public education in the least restrictive environment. This includes educating handicapped children with nonhandicapped children to the maximum extent appropriate.[132] That right is not limited by cost.[133] Cost, however, comes into play when considering how both sets of rights will be achieved. To end segregation, school districts need not build new schools in minority or white neighborhoods; they may use student reassignment and transportation to remedy the violation.[134] Similarly, in choosing among equally effective accommodations, one may consider which accommodation is the most economical in providing an appropriate education in the normal education environment.[135] Antidiscrimination law makes a sharp distinction between what conduct is unlawful and what actions are required as a remedy. When, as frequently happens, a choice of remedies is available to achieve the right, the choice to be made depends upon the particular circumstances. In the end, however, a remedy must be chosen appropriate to the scope of the violation.[136]

Under handicap discrimination law, however, costs may limit the duty of an employer to make reasonable accommodation. The courts, EEOC, the Office of Federal Contract Compliance Programs (OFCCP), and HHS articulate the concept of "undue hardship" as a defense for failing to accommodate in the employment context.

The HHS employment regulations define undue hardship as follows:

> In determining. . .whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:
>
> (1) The overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget;
>
> (2) The type of the recipient's operation, including the compositon and structure of the recipient's workforce; and
>
> (3) The nature and cost of the accommodation needed.[137]

[131] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–18, 29–31 (1971).

[132] If "related services" are necessary to achieve these rights, such services must be provided and cost is not a defense. See generally chap. 3 in the section entitled "Education for All Handicapped Children Act."

[133] *See, e.g.*, Hessler v. State Bd. of Educ. of State of Md., 700 F.2d 134, 138–39 (4th Cir. 1983) (fact that private school is less costly does not make it more appropriate).

[134] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25–31 (1971)

[135] Espino v. Besteiro, 520 F. Supp. 905, 909 (S.D. Tex. 1981). *But* cf. Tatro v. State of Tex., 625 F.2d 557, 564 n. 17 (5th Cir. 1981).

[136] *See, e.g.*, Dopcio v. Goldschmidt, 687 F.2d 644, 650 (2d Cir. 1982).

[137] 45 C.F.R. §84.12(c) (1982).

Similarly, OFCCP's regulations permit consideration of business necessity, initial cost, and continuing expenses of the accommodation.[138]

The undue hardship defense limits the right to accommodation because if none of the possible accommodations produces an individualized opportunity without imposing an undue hardship, the right to individualized opportunity is considered to be unachievable in that context, and the employer has not practiced unlawful discrimination. This limitation on the right appropriately requires not only that the handicapped person be capable of performing the essential functions of the position, but also that the employer be able to benefit from its employee's work. The law also calls for cost to be used as a factor in choosing among remedies. In accommodating the needs of handicapped Federal employees or applicants, the Federal courts are statutorily permitted to take into account: "the reasonableness of the cost of any necessary work place accommodation and the availability of any alternatives therefor or other appropriate relief in order to achieve an equitable result."[139]

The courts have not generally used this right-remedy distinction in analyzing how costs should be considered in different contexts. In addition, the analysis used by different courts has been inconsistent.[140] Nonetheless, several key considerations have emerged in recent decisions. As the HHS regulations note, costs cannot be considered in a vacuum but must be viewed in light of the purpose, nature, and resources of a particular program.[141]

Where Federal funds are received with the specific condition that accommodations are to be made to permit handicapped people to participate in areas such as rehabilitation[142] or education,[143] the defense of undue financial hardship is weaker.[144] In those instances, accommodation that calls for reallocating misspent funds or using unspent funds is not considered undue.[145]

Costs of accommodations should also be considered in light of the number of people served and the benefits gained. In

[138] 41 C.F.R. §60-741.6(d) (1982).

[139] 29 U.S.C. §794a(a)(1) (Supp. V 1981).

[140] *See* Bey v. Bolger, 540 F. Supp. 910, 926-27 (E.D. Pa. 1982) (light duty assignment in violation of collective bargaining agreement constitutes undue hardship); Tatro v. State of Tex., 625 F.2d 557, 564 n. 17 (5th Cir. 1980) (provision of clean intermittent catheterization to school girl rendered her capable of benefiting from regular classroom instruction and did not constitute undue hardship, although kidney dialysis might).

[141] 45 C.F.R. §§84.12(c) (1982); Dopico v. Goldschmidt, 687 F.2d 644, 650 (2d Cir. 1982).

[142] Jones v. Illinois Dep't of Rehabilitation, 689 F.2d 724, 729 (7th Cir. 1982).

[143] New Mexico Ass'n for Retarded Citizens v. State of N.M., 678 F.2d 847, 853 (10th Cir. 1982). Courts have also made this distinction with respect to making mass transit accessible to handicapped people. *See* Dopico v. Goldschmidt, 687 F.2d 644, 650 (2d Cir. 1982).

[144] The U.S. Supreme Court has given contradictory signals bearing on this issue. In Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 31-32 (1981), the Court opined that States might not be required to spend their own funds to improve their institutions for the mentally retarded. But, in Campbell v. Kruse, 434 U.S. 808 (1977), the Court directed a district court to consider on remand whether a State was required under section 504 to provide additional funds in order to finance its special education system adequately.

[145] Dopico v. Goldschmidt, 687 F.2d 644, 650 (2d Cir. 1982).

the context of special education, one court of appeals has observed:

> [T]he greater the number of children needing the particular special education service, the more likely that failure to provide the service constitutes discrimination. This is so because the more children in need of the service, the more the benefits of that service outweigh its cost.[146]

One court has suggested that a realistic assessment of the costs of accommodation must look beyond the cost of the accommodation itself and include an assessment of the costs to handicapped persons if the accommodation is not made and the benefits to handicapped persons if the accommodation is successful.[147] The most extensive analysis and application of these cost considerations has occurred in case law dealing with accessible public transportation issues as discussed in this chapter in the section entitled "Removing Architectural, Transportation, and Communication Barriers."

Differing Standards in Differing Societal Areas

As with the principle of individualization, the distinction between essential, as opposed to incidental, program elements leads to differing legal standards for different societal areas. The legal rule against fundamental alterations that impinge on essential program components or purposes or impose undue financial burdens cannot be readily applied without analyzing the particular societal area and its effect on the program or activity at issue. Concerning the relevance of context to determining limitations on the duty to make accommodations, one district court has noted:

> [T]he Education of the Handicapped Act made it clear that Congress recognized that, far from being "unqualified" for a public education, a handicapped child had a right to an appropriate public education. Thus, extensive modifications that might be "substantial" in other contexts may be reasonable efforts to educate handicapped children.[148]

On the other hand, in contexts such as employment, excessive costs may be a defense to the duty to render reasonable accommodation. In regard to a handicapped child's right to a free appropriate public education, as discussed above, cost is only a consideration in choosing among alternative ways of satisfying the obligation and is not a defense to the right itself.

In each particular context, the determination of what accommodations are legally mandated is a process of weighing various factors, including the practical feasibility of a proposed accommodation, the degree to which it will achieve the participation of the handicapped person, the number of other persons who will benefit from the accommodation, the costs of the accommodation, the degree to which it will inconvenience others, the availability of alternative methods of

[146] New Mexico Ass'n for Retarded Citizens v. State of N.M., 678 F.2d 847, 854 (10th Cir. 1982).

[147] Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 611-14 (D.R.I. 1982).

[148] Jose P. v. Ambach, 557 F. Supp. 1230, 1235 (E.D. N.Y. 1983).

accommodation, the safety of the proposed accommodation, and the availability of financial and other resources to assist in making the accommodation.

Exclusionary Classifications

Sometimes the process of individually matching persons with opportunities through reasonable accommodation is not reached because exclusionary classifications disqualify entire classes or subclasses of handicapped people. As the Supreme Court stated in *Southeastern Community College v. Davis:* "[M]ere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context."[149] For this reason, courts have carefully scrutinized and frequently struck down traditional handicap classifications. Courts have questioned or invalidated as overly broad exclusionary classifications explicitly based on blindness,[150] epilepsy,[151] mental retardation,[152] mental illness,[153] and multiple sclerosis.[154]

Exceptions to this general rule in regard to remedial programs, safety issues, and administrative burdens will be discussed below. Where those exceptions do not apply, a blanket exclusion based on a traditional disability status category should, in theory, be eliminated unless there is a one-to-one correlation with membership in that status category and the functional inability to meet necessary requirements. Few courts, however, have directly confronted this issue as yet. The hypothetical example of the prohibition against blind bus drivers is one situation where the interaction between a disability category and the actual, essential job requirements would preclude all members of a disability category group from participating safely in a position.[155] The U.S. Supreme Court's decision in *Davis* can be considered as involving a blanket exclusion rooted in interests of safety. In this context, the *Davis* decision analyzes whether hearing-impaired people who can only understand speech through lipreading are incapable of safely performing the duties of registered nurses.[156]

Selection criteria, in the sense of stated requirements that purport to measure physical or mental abilities or the ability to perform certain tasks or activities,[157] may also be discriminatory if they unnecessarily exclude people on the basis of their handicap. The validity of such selection criteria is not susceptible to easy analysis, and the law is not yet

[149] 442 U.S. at 405.

[150] Gurmankin v. Costanzo, 556 F.2d 184, 187–88 (3rd Cir. 1977) (due process). *Cf.* Coleman v. Darden, 595 F.2d 533, 536–38 (10th Cir. 1979), *cert. denied,* 444 U.S. 927 (1979) (due process).

[151] Duran v. City of Tampa, 430 F. Supp. 75, 78 (M.D. Fla. 1977) (denying preliminary injunction), 451 F. Supp 954, 955 (M.D. Fla. 1976) (granting injunction); Drennon v. Philadelphia General Hosp., 428 F. Supp. 809, 814–16 (E.D. Pa. 1977).

[152] Garrity v. Galen, 522 F. Supp. 171, 214–15 (D.N.H. 1981).

[153] Doe v. New York Univ., 666 F.2d 761, 779, n. 10 (2d. Cir. 1981) (dicta).

[154] Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981).

[155] 45 C.F.R. pt. 84, app. A at 296 (1981).

[156] The Court in *Davis,* however, went beyond the blanket classification to consider Davis' individual abilities within the context of the particular clinical training program involved. 442 U.S. at 407. See this chapter in the section entitled *"Southeastern Community College v. Davis:* Reasonable Accommodation as Part of Nondiscrimination Law."

[157] Some selection criteria are stated negatively; they check for physiological "irregularities" in the belief that such measurements correlate with ability.

settled. Although individualization is the touchstone in this area, existing legal standards do not necessarily require that a program assess the particular ability of each handicapped person to satisfy essential task or activity requirements. If the program has established selection criteria that are sufficiently related to its essential requirements, it may not have to assess individual abilities.[158]

Federal regulations require employment selection criteria to be job related under certain circumstances. EEOC's section 501 regulations state:

> An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified handicapped persons or any class of handicapped persons unless (1) the test score or other selection criterion, as used by the agency, is shown to be job-related to the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown. . .to be available. . . .[159]

OFCCP's section 503 regulations employ the same concept with slightly different language:

> The contractor shall provide in its affirmative action program, and shall adhere to the schedule for the review of all physical or mental job qualification requirements, to ensure that, to the extent qualification requirements tend to screen out qualified handicapped individuals, they are job related and consistent with business necessity and the safe performance of the job.[160]

[158] However, while an employer's selection criteria may be legally valid and not require individual assessments if sufficiently job related, a handicapped person who is excluded by such criteria may still be "qualified" under Federal regulations if the individual demonstrates an ability to perform the essential functions of the job. In such circumstances, the employer's selection criteria would not be illegal, but their application excluding the "qualified" handicapped individual would be prohibited discrimination under the Federal regulations. *See,* Prewitt v. United States Postal Service, 662 F.2d 292, 307 (5th Cir. 1981); Costner v. United States, 555 F. Supp. 146, 150 (E.D. Mo. 1982). See also discussion in this chapter in the section entitled "Defining Qualified Handicapped Individuals." *But cf.* Coleman v. Darden, 595 F.2d 533, 536–37 (10th Cir. 1979), *cert. denied,* 444 U.S. 927 (1979).

[159] 29 C.F.R. §1613.705(a) (1982). Similar language is used by the HHS employment regulations, 45 C.F.R. §84.13(a) (1982). The HHS regulations appear to create a very stringent standard of job relatedness for upholding selection criteria that tend to screen out handicapped persons. HHS has indicated that job relatedness is equivalent to "showing that a particular mental or physical characteristic is essential." 45 C.F.R. pt. 84, app. A., subpt. A, no. 5 at 296 (1982). In contexts other than employment, the HHS regulations similarly require eligibility requirements that disadvantage handicapped persons to be "essential." 45 C.F.R. §84.3(k)(4) (1982); 45 C.F.R. pt. 84, app. A, subpt. A, no. 5 at 297 (1982) (technical standards). The government-wide section 504 guidelines prohibit "criteria or methods of administration. . .[t]hat have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap." 28 C.F.R. §41.51(b)(1)(vii)(3)(i) (1982). Handicapped people are also protected from criteria or methods of administration that "have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons." *Id.,* §41.51(b)(1)(vii)(3)(ii) (1982).

[160] 41 C.F.R. §60–741.5(c)(1) (1982). Further, "the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business neces-

These regulations adopt the "disparate impact" standard for determining discrimination.[161] This standard was used by the U.S. Supreme Court in construing Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment on the basis of race, color, national origin, sex, and religion.[162]

In *Bentivegna v. U.S. Department of Labor,*[163] the United States Court of Appeals for the Ninth Circuit recently ruled illegal a City of Los Angeles employment practice that excluded people with diabetes mellitus (unless their condition was "controlled" at a certain blood sugar level) from all city jobs.[164] This standard was not connected to any particular job or set of job tasks.[165] Although the traditional disability status category "diabetic" was used to determine who was tested for blood sugar levels, the court properly focused on the legality of selection criteria requiring "controlled" blood sugar levels.

The city defended its employment practice by contending that uncontrolled diabetics suffered a greater risk of future injury and long-term health problems.[166] The court rejected both rationales, ruling that the evidence showed neither that diabetics with low blood sugar levels were less likely to be injured or have fewer long-term health problems nor that diabetics with high blood sugar were more likely to be injured or have greater long-term health problems.[167]

The court's rationale for strictly construing the job relationship and business necessity standard is informative:

> The Rehabilitation Act, taken as a whole, mandates significant accom-

sity and the safe performance of the job. The contractor shall have the burden to demonstrate that it has complied with the requirement of this paragraph." *Id.* §60-741.5(c)(2) (1982).

[161] *See* 45 C.F.R. pt. 84, app. A at 300-01 (1982) (tests and selection criteria). The appropriateness of applying legal standards developed in one area of civil rights law to another area is discussed more fully in chap. 7.

[162] Griggs v. Duke Power Co., 401 U.S. 424 (1971); 42 U.S.C. §§2000e-2000e(17) (1976 and Supp. V 1981).

[163] 694 F.2d 619 (9th Cir. 1982). Bentivegna sought review of the Secretary of Labor's final decision that he had not been discriminated against by the city of Los Angeles, a Federal grantee under a Department of Labor-administered CETA program.

[164] *Id.* at 620-21. The city apparently did not have a set number but a range. *Id.* at 620.

[165] *Id.* at 620-21, n. 1.

[166] *Id.* at 622.

[167] *Id.* at 622-23. One doctor testified for the city that "all diabetics are subject to progressive vascular and neurological problems that can elevate the risks associated with injury." *Id.* at 622. As the court notes, "If, as Dr. Hanks stated, the damage is done for all long term diabetics, the City's restrictions would be seriously underinclusive." *Id.* The court does not directly address the implication of its statement, that the city might be able to justify a classification that was still broader—no diabetics allowed on the city's payroll. The court suggests that such a blanket disability classification would also be unlawful:

> [A]llowing remote concerns to legitimize discrimination against the handicapped would vitiate the effectiveness of section 504 of the Act. Potentially troublesome health problems will affect a large proportion of the handicapped population. Consistent attendance and an expectation of continuity will be important to any employer. Such considerations cannot provide the basis for discriminatory job qualifications unless they can be connected directly to "business necessity" or safe performance of the job.

Id. The court might also have argued that Congress has made a policy determination that to the extent there is greater future risk to self (Bentivegna posed no danger to others), that risk will be accepted as a reasonable price for handicapped people's full participation in society.

modation for the capabilities and conditions of the handicapped. Blanket requirements must therefore be subject to the same rigorous scrutiny as any individual decision denying employment to a handicapped person. . . .The importance of preserving job opportunities for the handicapped sets a high standard for the effectiveness of job qualifications that adversely affect the handicapped. The regulation makes consistency with business necessity an independent requirement, and the courts must be wary that business necessity is not confused with mere expediency. If a job qualification is to be permitted to exclude handicapped individuals, it must be directly connected with, and must substantially promote business necessity and safe performance.[168]

There are exceptions and limitations to the law's rigorous scrutiny of blanket exclusions, whether based on traditional disability categories or physical or mental selection criteria. One is that disability-based classifications are permitted for remedial programs, services, or aids targeted to handicapped people.[169] Such programs may not, however, disadvantage handicapped people.[170]

As noted earlier, risk of injury to self or others has led several courts to uphold rather broad classifications excluding different groups of handicapped people. For example, Department of Transportation Federal motor carrier safety regulations prohibit people with diabetes mellitus who use insulin from operating motor vehicles as Federal intercity or interstate carriers.[171] In *Monnier v. U.S. Department of Transportation*,[172] a truck driver with diabetes who had driven 500,000 miles with only two minor accidents challenged this regulation as arbitrary and capricious and a denial of equal protection. A Federal district court upheld the regulation, noting that the question was not whether the plaintiff could drive safely, but whether it was an abuse of discretion by the agency to refuse to permit drivers with diabetes to seek waivers from the regulation on the ground that their particular cases of the disease were under control. The court concluded that the rule was not arbitrary or capricious[173] and was rational, given the agency's record of studies that showed "a significantly higher accident

[168] 694 F.2d at 621-22. Under a State antidiscrimination statute, the Supreme Court of Connecticut has ruled that a requirement of "normal vision" serves "as a direct disqualification of anyone with a visual handicap" and concluded that such "[b]lanket exclusions, no matter how well motivated, fly in the face of the command to individuate that is central to fair employment practices." Connecticut Inst. for the Blind v. Connecticut Comm. on Human Rights and Opportunities, 176 Conn. 88, 405 A.2d 618, 621 (1978). Problems with the administration of tests are also addressed by Federal regulations, *e.g.*, 29 C.F.R. §1613.705(b) (1982) and case law, *e.g.*, Stutts v. Freeman, 694 F.2d 666, 668-69 (11th Cir. 1983).

[169] 28 C.F.R. §41.51(c) (1982).

[170] Shirey v. Devine, 670 F.2d 1188, 1204-05 (D.C. Cir. 1982).

[171] 49 C.F.R. §391.41(b)(3) (1982). These regulations also exclude persons with a variety of other handicaps. In some cases, however, the regulation provides for a waiver. *See, e.g., id.*, §391.41(a) & (b)(1).

[172] 465 F. Supp. 718 (E.D. Wis. 1979).

[173] *Id.* at 721-24 (construing Administrative Procedures Act, 5 U.S.C. §706(2)(A) (1976)).

risk for diabetic drivers versus the general public."[174] It is unclear whether this case would have been decided differently had it been brought under section 504.[175] Some courts have rejected, under both constitutional theories and section 504, broad disability classifications based on safety arguments when the risks asserted proved to be unsupported fears.[176] Several other courts, however, have upheld similar classifications based on assumptions, rather than factual showings of increased safety risks.[177]

Litigation has provided no clear answer by which decisionmakers can judge the validity of disability classifications resulting from safety concerns. Because such classifications may prevent large groups of people from being "otherwise qualified," they should be carefully scrutinized to see that they are supported by adequate evidence and are not unnecessarily exclusionary.

Another exemption from the prohibition against broad classifications rests on claims of undue administrative burden. There may well be situations, such as in large governmental benefits programs, where imposition of individualization requirements would constitute undue administrative burdens, which *Davis* prohibited.[178] In *Costner v. U.S.*,[179] however, a

[174] 465 F. Supp. at 722, 724. *See also,* Lewis v. Metropolitan Transit Comm'n, 320 N.W.2d 426 (Minn. 1982); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977). *But cf.* Costner v. United States, 555 F. Supp. 146 (E.D. Mo. 1982). There is no clear standard for how much evidence is necessary or how much risk is permissible. In Doe v. New York Univ. Medical School, 666 F.2d 761 (2d Cir. 1981), a former medical student, whose self-destructive and violent psychotic episodes had resulted in her previous dismissal, sought readmission to a medical school partially on the ground that her mental illness was cured. The court of appeals agreed with the school that the applicant need not be readmitted "if there is a significant risk of. . .reoccurrence [of the attacks]." 666 F.2d at 777. By so holding, the court rejected the district court's test that the plaintiff must be deemed qualified if it was "more likely than not" that she could complete her medical education. *Id.* In Boynton Cab Co. v. Department of Industry, Labor and Human Relations, 96 Wis.2d 396, 291 N.W.2d 850 (1980), the Wisconsin Supreme Court interpreted the Wisconsin Fair Employment Practices Act to uphold a taxi company's refusal to hire a one-handed driver, noting that such a policy bore "a rational relationship to the safety obligations imposed upon a common carrier of passengers and that the standard. . .was not the result of an arbitrary belief lacking in objective reason or rationale." *Id.* at 861. The court reasoned that "for Boynton's policy to be reasonable and thus lawful, 'it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice'." *Id.* at 859, quoting Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied,* 419 U.S. 1122 (1975).

[175] The lawsuit was originally begun in 1976. Only in 1978 was the Rehabilitation Act of 1973 amended to include programs or activities of the Federal Government within the scope of section 504. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, §119(2), 92 Stat. 2955, 2982 (codified at 29 U.S.C. §794 (Supp. V 1981)).

[176] Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 622-23 (9th Cir. 1982); New York Ass'n for Retarded Citizens v. Carey, 466 F. Supp 487, 502-03 (E.D. N.Y. 1979) (segregation of mentally retarded children who were carriers of hepatitis B violated equal protection and section 504 when nonhandicapped carriers of hepatitis B were not segregated and there was inadequate showing of safety risk), *aff'd,* 612 F.2d 644 (2d Cir. 1979).

[177] Boynton Cab Co. v. Department of Industry, Labor and Human Relations, 96 Wis.2d 396, 291 N.W.2d 850, 860-61 (1980); Strathie v. Department of Transportation, Comm. of Pennsylvania, 547 F.Supp 1367, 1379 (E.D. Pa. 1982).

[178] Southeastern Community College v. Davis, 442 U.S. at 412. *See* Weinberger v. Salfi, 422 U.S. 749, 781-82 (1975).

Federal district court rejected the contention that the U.S. Department of Transportation lacked the resources or personnel to make an individualized determination of whether a person with epilepsy that is under control can safely operate a motor vehicle. "Such inconvenience," said the court, "should not stand in the way of justice."[180]

Removing Architectural, Transportation, and Communication Barriers

The process of individualized consideration of abilities and needs, which is central to reasonable accommodation, cannot occur when environmental barriers deny handicapped people access to programs and activities. Architectural, transportation, and communication barriers exclude or limit access to whole groups of handicapped individuals with similar functional limitations. Consequently, removal of those barriers is necessary before reasonable accommodations can be rendered.

As the introduction to this chapter explained, reasonable accommodation and the removal of environmental barriers are different aspects of nondiscrimination requirements. The former focuses on access for individuals, while the latter focuses on access for classes of handicapped people. Moreover, removal of environmental barriers frequently involves considerations of time and costs not present with respect to individualizing opportunities.[181] Although section 504, to varying degrees, requires the removal of all three types of environmental barriers, specific laws and legal standards apply to each type.

Architectural Barriers

The Architectural Barriers Act requires buildings constructed, altered, or financed by the Federal Government to be accessible to, and usable by, physically handicapped people.[182] According to one commentator, Congress: "intended the term 'buildings' to be given the broadest possible interpretation and included any structure used by the public, whether it be a small rest station at a public park or a multimillion dollar Federal office building."[183]

Section 504 regulations also contain architectural accessibility requirements. All federally assisted programs or activities must be accessible.[184] All new Federal or federally assisted buildings must be

[179] Costner v. United States, 555 F. Supp. 146 (E.D. Mo. 1982).

[180] *Id.* at 150, *citing* Stanton v. Stanton, 421 U.S. 7 (1975); *see also* Gurmankin v. Costanzo, 411 F. Supp. 982, 991 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977).

[181] The difference between removing environmental barriers that exclude a group and those that exclude an individual may sometimes be slim. Hospitals, for example, must establish a procedure for effective communication for hearing-impaired persons when they present themselves for emergency medical care. 45 C.F.R. §84.52(c) (1982). Although an interpreter may only be required to be present when a deaf person comes to the emergency room, prior to that time the hospital clearly must establish a procedure that will make it possible for an interpreter to be available. *See* 45 C.F.R. pt. 84, app. A, subpt. F, no. 36, at 310–16 (1982). This regulation requires the removal of a group communication barrier, but its implementation usually will benefit one individual at a time.

[182] 42 U.S.C. §4151 (1976).

[183] Goldman, "Architectural Barriers," p. 5.

[184] 28 C.F.R. §41.58(a) (1982); 45 C.F.R. §84.23(a) (1982). *See* Goldman, "Architectural Barriers," p. 14.

designed and built in compliance with accessibility requirements.[185] Alterations of existing facilities must also be accessible to the maximum extent feasible,[186] and programs or activities in all existing buildings must be made accessible.[187] Program accessibility does not necessarily mean that all existing buildings or every part of a building must be made accessible. For example, a recipient of Federal funds need not put an elevator in a multistory building if the program would be accessible on the first floor.[188]

The duty to provide architectural accessibility under both statutes is independent of any particular handicapped person seeking access. Conversely, compliance with minimum accessibility guidelines does not obviate the need for recipients of Federal financial assistance to make certain modifications tailored to a handicapped person's individual needs. Relocating particular offices or jobs to buildings or parts of buldings that are accessible to handicapped people, for example, might be such a modification.[189]

At present, no single set of minimum technical requirements for accessibility is in general use by architects and State and Federal regulatory bodies.[190] Adoption of a common standard would promote increased accessibility as new buildings are designed and constructed with varying physical abilities in mind.[191]

As chapter 4 noted,[192] providing for architectural accessibility in new buildings costs little, accounting for only an estimated one-tenth to one-half of 1 percent of construction costs. Perhaps because the costs are insignificant, especially when compared to the benefits of accessibility,[193] the Architectural Barriers Act and section 504 of the Rehabilitation Act provide only a limited cost-related defense for failure to meet their requirements. The Architectural Barriers Act permits the heads of each of four agencies authorized to issue accessibility standards under the statute to modify or waive any standard on a case-by-case

[185] 28 C.F.R. §41.58(a) (1982); 45 C.F.R. §84.23(a) (1982). *See* Goldman, "Architectural Barriers," p. 14.

[186] 28 C.F.R. §41.58(a) (1982); 45 C.F.R. §84.23(b) (1982).

[187] 28 C.F.R. §41.57(a) (1982); 45 C.F.R. §84.22(a) (1982).

[188] *See* 45 C.F.R. §84.22(b) (1982); 45 C.F.R. pt. 84, app. A, subpt. C, no. 20 at 301-02 (1982).

[189] 45 C.F.R. §84.12(b) (1982); 45 C.F.R. pt. 84, app. A., subpt. B, no. 16 at 300 (1982). Section 503 also requires covered Federal contractors to make certain architectural modifications for disabled employees or applicants. *See* 41 C.F.R. 60-741, app. B, at 564 (1982). A similar obligation exists with respect to Federal employees under section 501. 29 C.F.R. §1613.704(b)(1) (1982). *See also* Espino v. Besteiro, 520 F. Supp. 905 (S.D. Tex. 1981) (preliminary injunction granted requiring school district to air condition classroom of handicapped student).

[190] There is a divergence between the Architectural Transportation Barriers Compliance Board's "Minimum Guidelines" and the technical standards issued by the American National Standard's Institute, ANSI A117.1-1980. *See* 47 Fed. Reg. 33862-864 (1982); Goldman, "Architectural Barriers," p. 24. In addition, many States have laws and building code provisions relating to architectural accessibility for handicapped people. *See* Comment, "Access to Buildings and Equal Employment Opportunities for the Disabled: Survey of State Statutes," *Temp. L.Q.*, vol. 50 (1977), pp. 1067, 1074-76; Goldman, "Architectural Barriers," pp. 15-18.

[191] Goldman, "Architectural Barriers," pp. 23-25.

[192] See chap. 4 in the section entitled "The Costs and Benefits of Full Participation."

[193] Ibid.

basis, where such action is "clearly necessary."[194] Sections 501, 503, and 504 permit employers to interpose a defense of undue hardship where architectural modifications for employees or applicants would be too costly.[195] And while all programs and activities must be accessible immediately, alterations to existing buildings are required under a feasibility standard, with up to 3 years after the effective date of the agency regulation for completing the alterations.[196] Beyond these limited exceptions, cost is not a defense to providing accessible buildings and programs.

Transportation Barriers

Three separate Federal statutes bear on the obligation to provide accessible mass transit. In addition to section 504, section 16(a) of the Urban Mass Transportation Act[197] declared, as a "national policy," "that elderly and handicapped persons have the same right as other persons" to use mass transit and that "special efforts" shall be made in the planning and design of facilities and services to ensure that usable mass transit is available to those groups.[198] Section 165(b) of the Federal-Aid Highway Act[199] requires that projects funded under the act must be planned, designed, constructed, and operated to allow effective use by, among others, persons using wheelchairs. The legal standards under these Federal mandates have varied, however, and their application continues to be uncertain.

The Department of Transportation (DOT) has issued three different sets of regulations. The first adopted a special efforts approach, the second, under section 504, took a mainstreaming approach, and the third returned to a special efforts scheme. Because these three sets of regulations continue to govern aspects of many urban mass transit systems, they will be briefly summarized.

The first special efforts approach was embodied in regulations promulgated in 1976. These regulations required, among other things, that planning for transportation improvements funded by the Urban Mass Transportation Administration demonstrate satisfactory special efforts in planning services and facilities that would be usable by handicapped people.[200] Plans submitted for funding had to show projects designed to benefit handicapped people,[201] and since September 30, 1977, recipients must show reasonable progress in implementing previously planned projects.[202]

In 1979 the Department of Transportation issued new regulations, at least in part to comply with the government-wide section 504 guidelines that required, "[i]n the context of mass transportation, 'mainstreaming' mean[ing] the physical integration of the handicapped with other members of the traveling public."[203] The 1979 regulations set

[194] 42 U.S.C. §4156(1) (1976).

[195] See this chapter in the section entitled "Limitations Upon the Obligation to Accommodate."

[196] 28 C.F.R. §41.57(b) (1982).

[197] 49 U.S.C. §1612(a) (1976).

[198] *Id.*

[199] 23 C.F.R. §142 note (1976).

[200] 23 C.F.R. §450.120(a)(5) (1976); 49 C.F.R. 613.204(a) (1976).

[201] 49 C.F.R. §613.204(b) (1976).

[202] *Id.*, §1613.204(c).

[203] American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272, 1275 (D.C. Cir. 1981).

full accessibility as the goal and set specific criteria for determining, within a set time frame, its achievement with respect to various types of transportation.[204] The validity of the second set of regulations was put into question by *American Public Transit Association v. Lewis,*[205] which held that to the extent the regulations were based upon section 504, they required modifications that were too massive and too costly. The court remanded the case back to the Department of Transportation to see if the regulations could be based on the Federal Aid-Highway Act or the Urban Mass Transportation Act.[206] In response, DOT issued new regulations on July 21, 1981, superseding the 1979 regulations.[207] These new regulations essentially return to the special efforts approach of the 1976 regulations.[208]

Courts have rejected handicapped plaintiffs' claims of a right to totally accessible mass transit systems under all three Federal statutes[209] and under constitutional theories.[210] Recently, however, two courts have stated that section 504 requires some degree of accessibility to mass transit for handicapped people. In *Dopico v. Goldschmidt,*[211] the United States court of appeals required a district court to hear the merits of a section 504 claim seeking changes in the New York City transit system, noting: "We believe that section 504 does require at least modest, affirmative steps, to accommodate the handicapped in public transportation."[212] In *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority,*[213] a district court held that a transit authority violated section 504 by planning to purchase non-lift-equipped buses. In so doing, the court also called into question the narrow interpretation of section 504 by the Department of Transportation in its 1981 special efforts regulations.[214]

As the foregoing makes clear, the issue of expense has been a particular concern of courts[215] and regulators[216] alike in trying to set a standard for accessible mass transit. The substantial costs in-

[204] *See* 49 C.F.R. pt. 27 (1980). The regulations required that by July 1982 at least one-half of the peak hour fixed route bus and light rail service must be accessible to wheelchair users. *Id.*, §27.85(a)(1) and §27.89(a)(2). Rapid and commuter rail systems were also to be accessible to handicapped persons using steps, and "key" stations, such as those heavily used, those that are transfer or terminal points, and those serving major activity centers, were to be accessible to wheelchair users. *Id.*, §27.87(a)(1). Extraordinary structural changes could be made over a 30-year period. *Id.*, §27.87(a)(4).

[205] 655 F.2d 1272 (D.C. Cir. 1981).

[206] *Id.* at 1277-80.

[207] 49 C.F.R. §27.77 (1982).

[208] *See* Dopico v. Goldschmidt, 687 F.2d 644, 647-48 (2d Cir. 1982).

[209] *See* Dopico v. Goldschmidt, 687 F.2d 644, 647-48 (2d Cir. 1982); Lloyd v. Illinois Regional Transp. Auth., 548 F.Supp 575, 584 (N.D. Ill. 1982); Michigan Paralyzed Veterans of America v. Coleman, 545 F. Supp. 245, 249-50 (E.D. Mich. 1982).

[210] *E.g.*, United Handicapped Fed'n v. Andre, 558 F.2d 413, 415-16 (8th Cir. 1977); Leary v. Crapsey, 566 F.2d 863, 865-66 (2d Cir. 1977); Lloyd v. Illinois Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

[211] 687 F.2d 644 (2d Cir. 1982).

[212] *Id.* at 652. The Court rejected an all-or-nothing approach to the issue. *Id.* at 653.

[213] 549 F. Supp. 592 (D.R.I. 1982).

[214] *Id.* at 609.

[215] *See, e.g.*, American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272, 1278 (D.C. Cir. 1981).

[216] Cost considerations were one of the major reasons why the new "special efforts" Transportation Department regulations were promulgated under the Reagan administration's regulatory review process. *See* 46 Fed. Reg. 37,488 (1981).

volved in making mass transit accessible must be viewed in context. The *Rhode Island Public Transit Authority* decision commented on the costs of making a mass transit system more usable by mobility-handicapped persons: "The question presented. . .is whether the benefits of the purchase to the handicapped outweigh the financial expense that would be incurred by the State."[217] In *Dopico v. Goldschmidt*,[218] the court noted that a $6 million expenditure for transportation services to the handicapped out of a total Federal mass transportation subsidy to the city of $490 million, although a considerable sum, "was not 'massive' either in absolute terms or relative to the City's total receipt of mass transportation assistance. . . ."

The government-wide Department of Justice section 504 regulations also make clear that the time period within which to make accessibility modifications is also a relevant consideration. The regulations permit extending the time period in which to make "extraordinary and expensive structural changes."[219] Although time as a factor has not been extensively discussed, it seems reasonable that some barriers to access by handicapped people can be eliminated quickly and at little cost. Eliminating other barriers, such as making mass transit accessible, is a more evolutionary process that requires extensive planning and may take a generation. The ability to spread the cost of such barrier removals over time would appear to be an important consideration in a rational assessment of the reasonableness of proposed accommodation costs.

Communication Barriers

Communication barriers involve the ways people receive and send information and messages that are not accessible to people with certain types of handicaps. Deaf people, for example, may not receive audible communications, and blind people may not have access to communications in usual printed form. People with certain learning disabilities, such as dyslexia, may also have trouble with written communication. In some circumstances, such communication barriers may constitute illegal handicap discrimination.

The 1978 amendments to the Rehabilitation Act of 1973 gave the Architectural and Transportation Barriers Compliance Board authority to "investigate and examine alternative approaches" to the elimination of communication barriers and to make appropriate recommendations for legislation to the President and Congress.[220] Under HHS regulations, health, welfare, and social service providers subject to section 504 must take necessary steps to see that notices concerning benefits or services, written material concerning waivers of rights, and consent to treatment are provided effectively to handicapped people generally

[217] Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 613 (D.R.I. 1982).

[218] Dopico v. Goldschmidt, 687 F.2d 644, 650 (2d Cir. 1982).

[219] 28 C.F.R. §41.57(b) (1982).

[220] Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. no. 95–602, §118(b)(2), 92 Stat. 2955, 2980 (codified as amended at 29 U.S.C. §792(b)(2) (Supp. V 1981). The Board already had this authority with respect to architectural, transportation, and attitudinal barriers. 29 U.S.C. §722(b) (1976).

and to persons "with impaired sensory or speaking skills" particularly.[221] Hospitals receiving Federal funds are required to "establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care."[222]

The desirability of making television more available and undertandable to hearing-impaired people has recently been recognized by the United States Supreme Court. In *Community Television of Southern California v. Gottfried*,[223] the Court reviewed a Federal Communications Commission (FCC) decision that refused to deny a license renewal to a television station that had allegedly not made sufficient efforts, through processes such as captioning, to improve service to those with hearing impairments. The Court recognized the important public interest at stake and indicated that "the FCC has an administrative duty to consider the needs of handicapped citizens."[224] Because the FCC was not a funding agency, however, and in the absence of any pertinent regulations, the Court ruled that the FCC had not abused its discretion in granting the license renewal.[225] Nonetheless, the decision strongly suggests that section 504 may be interpreted to require the elimination of unnecessary communication barriers.

Conclusion

Handicap nondiscrimination laws and the regulations and case law interpreting them permit some general statements about handicap discrimination involving reasonable accommodation. Illegal handicap discrimination occurs when a qualified handicapped person, or a person who would be qualified with a reasonable accommodation, is disadvantaged or denied an opportunity solely on the basis of handicap because a reasonable accommodation is refused. Reasonable accommodation means providing or modifying devices, services or facilities or changing practices or procedures in order to match a particular person with a particular program or activity. Its essence is making opportunities available to handicapped persons on an individualized basis. A number of legal standards have emerged, including those involving: the definition of a "qualified handicapped individual" entitled to accommodation; a requirement that equivalent opportunity be provided; limitations upon the duty to accommodate; requirements regarding the elimination of discriminatory selection criteria; and requirements regarding the removal of architectural, transportation, and communication barriers.

These general legal statements emphasize that there is a duty to accommodate unless the context and all the circumstances make accommodation unreasonable. Although accurate, general statements do not provide simple legal rules that answer in advance the questions of when, what, and how much accommodation is due in given circumstances. Regulators, courts, and those subject to these laws face many complexities and difficulties in understanding and applying handicap nondiscrimina-

[221] 45 C.F.R. §84.52(b) (1982).
[222] *Id.*, §84.52(c).
[223] 103 S.Ct. 885 (1983).
[224] *Id.* at 892, n. 14.
[225] *Id.* at 891.

tion law and reasonable accommodation requirements.

One district court judge, grappling with these problems, has concluded "there is [no] magical formula that can be used to determine precisely what modifications of. . .existing program[s] are required by §504."[226] This view was recently seconded by authors of the U.S. Department of Labor's section 503 accommodation study. The study recommends that the Department formulate a series of guidelines to help employers comply with section 503's accommodation requirement.[227] The essence of the study's recommendation is that a series of relevant considerations or questions be established that an employer could use to assess the need for and reasonableness of specific accommodations for a particular handicapped worker.

The idea that the obligation to make a reasonable accommodation in a particular instance might best be defined by a process has merit. Administrative agencies could identify factors appropriate for elementary and secondary education, higher education, employment, and other areas. They could suggest the weight to be given to different factors by covered programs. Regulations could also require programs to seek technical assistance from groups experienced in making accommodations in particular contexts. And, of course, the regulations might also require specific types of accommodations, as they do now in such areas as the delivery of emergency health care to persons with hearing impairments. Establishing a process that requires consideration of all relevant factors will not solve the dilemma of the program official who wants to know exactly what accommodation is required to comply with the law. That degree of certainty is probably impossible in handicap antidiscrimination law. But it will provide those who must comply with the law and those who must enforce it with a clearer understanding and consistent framework for matching particular handicapped people with particular programs.

[226] Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 611 (D.R.I. 1982).

[227] *Accommodation Study*, pp. 104–05.

Chapter 7

Applying Established Civil Rights Law to Handicap Discrimination

Handicapped people have drawn extensively from the civil rights strategies of other groups. The words of the U.S. Supreme Court in the school desegregation decision, *Brown v. Board of Education,* provided the cornerstone of the equal educational opportunity lawsuits brought on behalf of handicapped children:

> In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[1]

One of the first decisions finding a constitutional right to equal public education for handicapped children, *Wolf v. Legislature of the State of Utah,*[2] does little more than paraphrase the Supreme Court's language in *Brown.* The *PARC* decision,[3] an early milestone of civil rights efforts for handicapped persons, and subsequent special education cases were consciously patterned after school racial desegregation cases.[4]

Handicap antidiscrimination laws, such as section 504 of the Rehabilitation Act of 1973,[5] parallel earlier civil rights legislation.[6] In fact, section 504 was added to the Rehabilitation Act after several attempts to amend the Civil Rights Act of 1964 to include handicapped persons failed in Congress.[7]

Handicapped people have also borrowed from racial and ethnic minorities and women many tactical approaches and persuasive techniques. In 1977, for example, handicapped people demonstrated in 10 American cities seeking an

[1] 347 U.S. 483, 493 (1954).

[2] Civil No. 182646 (3d Judicial Dist. Ct., Utah, Jan. 8, 1969).

[3] Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pa., 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa. 1972).

[4] Leopold Lippman and I. Ignacy Goldberg, *Right to Education: Anatomy of the Pennsylvania Case and Its Implications for Exceptional Children* (New York: Teachers College Press, 1973), pp. 21, 24.

[5] 29 U.S.C. §794 (Supp. V 1981).

[6] See discussion of the Rehabilitation Act in chap. 3 in the section entitled "Rehabilitation Act of 1973."

[7] *See* 119 Cong. Rec. 7114 (daily ed. Mar. 8, 1973); S. Rep. No. 1297, 93d Cong. 2d Sess. 4, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6390.

end to delays in the promulgation of regulations implementing section 504.

The literature recounting advocacy for handicapped people acknowledges the legacy of earlier civil rights efforts, particularly the large body of civil rights jurisprudence and experience upon which handicap discrimination law builds.[8] But, because the classification "handicap" differs from other antidiscrimination classifications, such as race, sex, national origin, age, and religion, there are significant limits to applying established civil rights law to discrimination based on handicap. After explaining these distinguishing characteristics, this chapter counsels against mechanically incorporating in handicap discrimination law the antidiscrimination concepts and standards developed in other civil rights contexts. It suggests that in addressing particular issues, established civil rights law should be selectively incorporated into handicap discrimination laws based on the nature of this protected class, the nature and extent of the discrimination its members experience, and the congressionally mandated objective of full participation.

Distinguishing Features of the Handicap Classification

Civil rights laws use nearly identical words to prohibit discrimination on the basis of race, sex, national origin, religion, age, and handicap. This common language bespeaks the obvious parallels. But these commonalities should not obscure the distinguishing characteristics of each protected class. Although the unique features of the classification of "handicap" cannot by themselves determine when to apply to handicap discrimination law the legal analyses developed with regard to other kinds of discrimination, they underscore significant differences that may have legal consequences.

Functional Limitations

> [T]he most significant difference between the handicapped and other protected classes is the fact that the condition which initially gives rise to the protective status may also affect an individual's. . . performance.[9]

Chapter 5 describes how the status category of handicapped and various disability labels applied to handicapped

[8] *E.g.*, Jack Achtenberg, "Law and the Physically Disabled: An Update with Constitutional Implications," *Sw. L. Rev.*, vol. 8 (1976), pp. 847, 849, n. 3; Lippman and Goldberg, *Right to Education*, pp. 12-15; Marcia P. Burgdorf and Robert L. Burgdorf, Jr., "A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause," *Santa Clara Lawyer*, vol. 15 (1976), p. 855; David Yuckman, "Employment Discrimination and the Visually Impaired," *Wash. & Lee L. Rev.*, vol. 39 (1982), p. 69; Frank Bowe, *Handicapping America* (New York: Harper & Row, 1978), p. 190. The suggestion that civil rights efforts by handicapped persons should parallel the prior efforts of racial minorities was made in two seminal works that were published in 1969. U.S., Department of Health, Education, and Welfare, *Legal Rights of the Disabled and Disadvantaged*, by Richard Allen (Washington, D.C.: Government Printing Office, 1969), pp. 1-8, 79-84; Leonard Kriegel, "Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro," *American Scholar*, vol. 38 (1969), p. 412.

[9] Amy Jo Gittler, "Fair Employment and the Handicapped: A Legal Perspective," *DePaul L. Rev.*, vol. 27 (1978), pp. 953, 967 (hereafter cited as Gittler).

people distort the fact that mental and physical abilities occur along a spectrum. Despite the artificiality of the handicapped-normal dichotomy and the arbitrariness of the line-drawing, however, actual functional limitations are generally the basis for labeling people as handicapped. Most, but not all,[10] of those designated handicapped do suffer some impairment of function. As discussed in chapter 2, prejudice and inaccurate stereotypes may overestimate actual limitations, but some limitation on functional ability may nonetheless exist. In fact, many legal definitions of handicap require as a component that the condition affect performance or function.[11] A close correlation exists, therefore, between handicaps and functional limitations of some type.

This contrasts sharply with race and sex, which are based on the physical characteristics of skin color and gender, not functional limitations. Race has no correlation with innate ability. And although there may be some statistical correlation between gender and ability to perform certain tasks, such as lifting heavy weights, no inference can be drawn about the ability of any particular member of one sex to perform a task as well as all members of the other sex.[12] Except in the case of the very few activities, such as modeling clothing or dramatic acting, for which it may be a legitimate prerequisite,[13] gender cannot be presumed to limit people's functions

[10] Conditions labeled handicaps and limitations on ability are not precisely coextensive. Many persons considered handicapped in general parlance are not actually impaired. For example, persons with epilepsy whose seizures are controlled by medication, lower leg amputees with proper prosthetic devices, and persons with cosmetic disfigurements may not have any limitations upon their ability to perform tasks, but will in all probability still be considered handicapped. Moreover, the application of the label "handicapped" is not at all a clear indicator of which functions an individual can or cannot perform; as noted in chapter 2, inaccurate stereotypes about the functional limitations of handicapped persons are a major problem. In addition, persons may be mislabeled as having an impairment they do not actually have, and a history of a condition like mental illness or cancer may be perceived as creating a continuing impairment even after full recovery.

[11] One part of the definition under the Rehabilitation Act of 1973 links a handicap to an impairment "which substantially limits one or more of such person's major life activities." 29 U.S.C. §706(7)(B) (Supp. V 1981). A "developmental disability" under Federal legislation must be a disability that "results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic sufficiency." 42 U.S.C.A. §6001(7)(D) (Supp. IV 1980). Under the Tax Reform Act of 1976, a handicapped individual is any person with a physical or mental disability "which for such individual constitutes or results in a functional limitation to employment, or. . .which substantially limits one or more major life activities of such individual." 26 U.S.C. §190(b)(3) (1976).

[12] *See, e.g.,* Weeks v. Southern Bell Tel. and Tel. Co., 408 F.2d 228, 235–36 (5th Cir. 1969) (company could not demonstrate that all or substantially all women could not lift weight of 30 pounds or more).

[13] Under Title VII, 42 U.S.C. §2000e–2(e) (1976), sex-based discrimination is permitted "in those circumstances where. . .sex. . .is a bona fide occupational qualification [BFOQ] reasonably necessary to the operation of that particular business or enterprise." The Supreme Court has indicated that "the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

or activities.[14] Age is somewhat linked with performance because with advanced age may come impaired mental and physical functioning. Nonetheless, it cannot be assumed that all people who have reached a designated age cannot perform particular functions or engage in particular activities as well as people a few years younger. A correlation between age and performance exists, but it is imprecise and unpredictable. With handicaps, however, functional limitations are closely correlated.

Knowing people's sex, race, national origin, religion, or age does not allow us to judge their abilities to perform tasks or engage in activities. Knowing their handicaps may give pertinent information about their individual functional abilities. As a result, handicap differs from other protected classes in that membership in the class is frequently predicated on real, functional differences—differences that may need to be taken into account and accommodated if its members are to participate fully in society. The goal is neither to exaggerate and stereotype nor to ignore handicapped people's functional limitations.

Indefinite Membership

Defining who is handicapped is highly arbitrary because of the artificial nature of the concept of handicaps. As chapter 5 explains, the definition of handicap can be no more precise than the phenomenon—the spectrum of human physical and mental differences—it seeks to describe. This inherent difficulty is further complicated by the number of definitions now in use. In addition to those in Federal laws, the States have several versions for different statutory purposes, such as education, employment, and worker's compensation. The subcategories and sub-subcategories of handicapping conditions, each of which may have one or more definitions of its own, further complicate this profusion of definitions.

Although definitions of the other protected classes may encounter some difficulties, they do not approach the multiplicity and variability that characterize definitions of handicapped people.

Causation

In contrast to race, sex, age, national origin, and religion, the causes of handicaps are many and varied. They may result from genetic defects, prenatal injuries, injuries during the birth process, and postnatal causes. Genetic abnormalities result in such conditions as Down's syndrome and phenylketonuria (PKU). An individual may become handicapped as a result of illness or disease, accidents (including industrial, automobile, and home), war, or as an incident of old age. Mental disorders may result from childhood traumas, emotional problems, or senility. Handicaps are also linked with lack of infant stimulation, poor nutrition, inadequate medical care, and poverty.

In addition to these and other known causes of handicapping conditions, many causes of handicaps have not yet been

[14] Religion has very little impact upon functional abilities and performance. Except for particular activities that are prohibited under the tenets of a religion, a person's religion has no consequences for judging a person's ability to engage in activities or perform tasks. Similarly, except for a possible correlation with language skills, there is no relation between national origin and ability.

discovered. Thus, the causes of handicaps are more complex, numerous, and diverse than the relatively straightforward causative factors involved in sex, race, national origin, religion, and age.

Nonexclusivity

Some handicapped people describe nonhandicapped people as "temporarily able-bodied" to stress the fact that a handicapping condition can strike anyone and that there is no guarantee against joining the class of handicapped persons in the future.[15] According to one commentator, "Most disabled people are adventitiously impaired. That is, they became disabled rather than being born that way."[16] Handicaps are nonexclusive: everyone is eligible to become handicapped. In contrast, race and gender classes include specific groups of people; those included will remain so, and nonmembers will never be eligible to become members. Membership in a sex or a race is, thus, *exclusive,* i.e., limited to a specific group of people.

The nonexclusivity of handicaps has an additional dimension. Handicaps rarely are directly passed down from generation to generation. Most handicaps have no genetic basis, and even hereditary conditions tend to be based on recessive genes that are not directly manifested in succeeding generations.[17] Most handicapped parents bear nonhandicapped children, and conversely, most handicapped children are born to parents who are not handicapped.[18] As a result, although the damaged self-concepts and lowered expectations resulting from prejudice and discrimination are not passed along to each generation, neither are the positive approaches to coping with handicaps.[19]

Other Differences

Unlike the other civil rights classes, the class of handicapped persons is subject to a "medical model" that suggests a perception they are diseased or sick and need help to get "well." This perception negatively influences the way handicapped people are treated and perceived and affects their self-images.[20]

All too often, racial and ethnic minorities, women, religious minorities, and elderly people are stereotyped, although each group is comprised of diverse and

[15] *E.g.,* Frank Bowe, statement, *Civil Rights Issues of Handicapped Americans: Public Policy Implications,* a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., May 13–14, 1980, p. 10 (hereafter cited as *Consultation);* Harlan Hahn, "Paternalism and Public Policy," *Society,* vol. 20, no. 3 (1983), p. 44.

[16] Bowe, *Handicapping America,* p. 34.

[17] *See, e.g.,* Charles W. Murdock, "Sterilization of the Retarded: A Problem or a Solution?" *Cal. L. Rev.,* vol. 62 (1974), pp. 917–28; Marcia P. Burgdorf and Robert L. Burgdorf, Jr., "The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons," *Temp. L.Q.,* vol. 50, no. 4 (1974), p. 1008 (hereafter cited as "Sterilization of Handicapped Persons").

[18] *See, e.g.,* Murdock, "Sterilization of the Retarded," p. 926; Bowe statement, *Consultation,* p. 11; "Sterilization of Handicapped Persons," p. 1008.

[19] "While black children usually have two black parents, disabled children normally have two able-bodied parents. The process of moving toward assertiveness and independence, then, must begin anew with each child." Bowe statement, *Consultation,* p. 11.

[20] *E.g.,* John Gliedman and William Roth, *The Unexpected Minority* (New York: Harcourt Brace Jovanovich, 1980), pp. 18–21, 35–51, 301–03; Kent Hull, *The Rights of Physically Handicapped People* (New York: Avon Books, 1979), p. 21; Sar Levitan and Robert Taggart, *Jobs for the Disabled* (Baltimore: Johns Hopkins Univ. Press, 1977), p. xi.

unique individuals. Nonetheless, the members of each group share one characteristic—race, national origin, being female, age, or membership in a religion. Because the handicap category lumps together all those who do not fit into the "normal" category, membership does not require even a single common characteristic. It is the difference from any of the vast number of physical and mental characteristics considered normal that defines membership in the handicap class. As a result, handicapped people are an exceedingly heterogeneous group.[21]

Handicaps also differ from race, sex, religion, national origin, and age in that their functional limitations may be changed by advances in medical, mechanical, and scientific technology. For example, developments in microcomputer technology hold great promise for electrical stimulation of otherwise motionless muscles, which could restore function to areas of the body below the damaged vertebrae in cases of paralysis due to severing of the spinal cord.[22] Similarly, devices such as the Kurzweil Reader, which translates printed materials into vocal sounds, and the Opticon, which transfers printed letters to raised letters that can be read by touch, may give blind persons easy and immediate access to printed materials.[23]

The unique aspects of the handicapped class do not, of course, mean that handicapped people are totally distinct from members of other protected classes. Many handicapped individuals are also women or members of racial and religious minorities. These handicapped persons often face serious problems of "double discrimination."[24] The functional limitations and prejudice accompanying handicaps greatly compound and are compounded by discrimination encountered by members of racial and ethnic minority groups and women. With regard to employment and other opportunities, handicapped members of these groups fare much worse than their nonhandicapped peers.[25] There is also evidence that some advocacy and service programs for handicapped people have underserved disabled people who are members of minority groups.[26]

Moreover, differences in the class characteristics and dynamics of discrimination faced by each group should not overshadow the many commonalities

[21] *See, e.g.*, Prudence Rains, John Kitsuse, Troy Duster, and Eliot Friedson, "The Labeling Approach to Deviance," *Issues in the Classification of Children*, ed. Nicholas Hobbs (San Francisco: Jossey-Bass, Inc., 1975), vol. 1, pp. 88, 91–92; Leonard Kriegel, "Claiming the Self: The Cripple as American Male," *Disabled People as Second-Class Citizens*, eds. Myron Eisenberg, Cynthia Griggins, and Richard Duval (New York: Springer Publishing Co., 1982), pp. 52, 58; *Consultation*, p. 139.

[22] "Computerized System Helps A Paralyzed Woman to Walk," *New York Times*, Nov. 12, 1982, p. A–23; "Power to the Disabled," *Time*, Dec. 13, 1982, pp. 76–77.

[23] Harvey Lauer and Leonard Mowinski, "Communication Aids for the Blind: Part I: Personal Reading Machines," *Braille Forum*, vol. 18, no. 7 (January 1980), p. 5; David A. Yuckman, "Employment Discrimination and the Visually Impaired," *Wash. and Lee L. Rev.*, vol. 39 (1982), pp. 69, 88–89.

[24] Disability Rights Education and Defense Fund, Inc., "Race and Disability: A Concept Paper" (Berkeley: 1982), pp. 2–4.

[25] Hull, *The Rights of Physically Handicapped People*, p. 176; "Statement of Leslie B. Milk," *Consultation*, pp. 127, 128.

[26] *See, e.g.*, Rosalyn Simon, "Reaching Out to the Minority Developmentally Disabled" (Baltimore: Developmental Disabilities Law Project, Inc., 1982), pp. 1, 17–18; "Statement of Yetta W. Galiber," *Consultation*, pp. 242–46.

that exist. Just as race, gender, and national origin are "immutable characteristic[s] determined solely by the accident of birth,"[27] handicaps also tend to be permanent characteristics[28] beyond the control of the individual.[29] All these groups have suffered a history of serious discrimination. They share common goals of integration and increased participation in society. They all seek to eliminate arbitrary criteria that have excluded them, to eliminate stereotyping and irrational biases, and to replace the vestiges of past discrimination with fair practices and procedures that yield judgments based on individual merit and ability. These similarities unite handicapped people with members of other disadvantaged groups:

> This essential unity among the protected classes is both a practical and a moral imperative. It is a moral imperative because any decent system of values knows no priorities among people deprived of their essential humanity. The only way to approach the eradication of the evil of discrimination is to face the high truth that we are all equal—black and brown, female and disabled. If that equality is not attained internally among us, the essential lesson of equality we are trying to impart to the rest of society will be lost.[30]

Applying Established Civil Rights Law

In prohibiting discrimination on the basis of handicap, "Congress demon-

[27] Frontiero v. Richardson, 411 U.S. 677, 686 (1973) *See* Fiss, "A Theory of Fair Employment Laws," *U. Chi. L. Rev.*, vol. 38 (1971), pp. 235, 241.

[28] Although handicaps tend to be permanent, there are some exceptions. Some disabilities tend to be identified only during school; people with learning disabilities or some mental retardation may stop being handicapped when they finish school. Also, some handicapping conditions may be cured, either by medical treatment or other remedial services. A case of mental illness, for example, may be successfully treated. Or surgery might cure a particular case of deafness. Additionally, some authorities have observed that the categorization of a person as handicapped tends to be played down or ignored if the person achieves great success. Gliedman and Roth, *The Unexpected Minority*, pp. 28–29. Julius Caesar, Milton, Beethoven, Dostoevsky, and Edison all had serious handicapping conditions, but are seldom thought of as handicapped. "We remember FDR's cigarette holder better than his wheelchair." Ibid., p. 29. This contrasts with race where the characteristic rarely goes unnoticed: "We never forget the blackness of Paul Robeson, Jackie Robinson, and James Baldwin." Ibid., p. 29. However, the great majority of persons who are considered handicapped today will in all probability be deemed handicapped tomorrow and for the rest of their lives.

[29] "Handicapped persons. . .lack individual control over their handicap status." Gittler, p. 970. A few conditions sometimes included within the definition of handicaps may be voluntary to a greater or lesser degree—drug addiction, alcoholism, and obesity are the most frequently mentioned examples (ibid., pp. 970, 985–86), but most handicapping conditions are involuntarily imposed through unavoidable circumstances. One State supreme court has ruled that handicaps fall within the U.S. Supreme Court's criteria of "immutable characteristics determined by the accident of birth" and therefore merit treatment as an "inherently suspect" classification for purposes of constitutional analysis. In re G.H., 218 N.W.2d 441, 447 (N.D. 1974). *But see* Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); New York Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 762–63 (E.D.N.Y. 1973), *partially reconsidered*, 393 F. Supp. 715, 719 (E.D.N.Y. 1975). *See also* Fialkowski v. Shapp, 405 F. Supp. 946, 959 (E.D. Pa. 1975); Lora v. Board of Educ. of City of N.Y., 456 F. Supp. 1211, 1275 (E.D.N.Y. 1978); Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976).

[30] Eleanor Holmes Norton, May 1979 statement to President's Committee on Employment of the Handicapped, quoted in *Consultation*, p. 142.

strated that it perceived discrimination against the handicapped as fundamentally similar to other forms of discrimination—on the basis of race, sex, national origin, or religious belief—addressed in Title VII of the Civil Rights Act of 1964."[31]

> Recognizing the parallels between the discrimination suffered by the handicapped and other minority groups, manifested particularly through their segregation from the rest of society, members of Congress sought to combat the problem through a remedy which had proven successful in the past, civil rights legislation.[32]

Section 504 of the Rehabilitation Act of 1973, modeled upon Title VI of the Civil Rights Act of 1964[33] and Title IX of the Education Amendments of 1972,[34] has been held "part of the general corpus of discrimination law."[35] In passing the statute, "Congress apparently relied on the assumption that section 504 would be enforced as had previous civil rights legislation. . . ."[36] From a legal standpoint, the relationship between the handicapped rights provisions and other civil rights laws is significant because it guides courts and administrative agencies in implementing the law.[37]

With regard to many issues, particularly procedural ones, the courts have directly applied civil rights concepts, precedents, and analyses to cases involving discrimination against handicapped people. For example, courts have cited legal precedents establishing an implied right of action under Title VI and Title IX to support a private right of action under section 504.[38] Court decisions establishing that exhaustion of administrative remedies is not a necessary prerequisite to filing a civil rights court suit

[31] Shirey v. Devine, 670 F.2d 1188, 1195 (D.C. Cir. 1982). *See also* Hull, *The Rights of Physically Handicapped People,* p. 26. The Commission in another context has sharply distinguished comparisons of the *forms* of discrimination from comparisons of the *amount* or *quality* of discrimination encountered by historically disadvantaged groups. When various groups exist in a situation of inequality within a society, it is self-defeating to become embroiled in quarrels over which is more unequal or the victim of greater oppression. "It is far more productive to understand the various forms and dynamics of the discrimination that minorities and women experience than to engage in endless, value-laden debates over who is suffering more." U.S., Commission on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination* (1981), p. 12 (hereafter cited as *Affirmative Action Statement).*

[32] Garrity v. Gallen, 522 F. Supp. 171, 205 (D.N.H. 1981).

[33] 42 U.S.C. §2000d (1976).

[34] 20 U.S.C. §1681 (1976).

[35] New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979).

[36] Garrity v. Gallen, 522 F. Supp. 171, 205 (D.N.H. 1981).

[37] Hull, *The Rights of Physically Handicapped People,* pp. 25–26.

[38] *See* Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1379–80 (10th Cir. 1981); Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980); NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds,* 442 U.S. 397 (1979); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); Lloyd v. Regional Transp. Authority, 548 F.2d 1277 (7th Cir. 1977); Camenisch v. University of Tex., 616 F.2d 127, 131 (5th Cir. 1980), *vacated on other grounds,* 451 U.S. 390 (1981); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981); Miener v. State of Mo., 673 F.2d 969 (8th Cir. 1982).

have been held applicable to section 504 cases.[39] Generally, courts have analyzed such terms as "Federal financial assistance" and "program or activity"[40] and such issues as the availability of back-pay, monetary damages, injunctive relief, and attorney's fees[41] by applying to section 504 the principles established in Title VI and Title IX cases. Title VI and constitutional desegregation cases have served as a basis for decisions holding that handicapped children have a right, under section 504, to a free appropriate public education.[42]

Although the body of previous civil rights laws has provided a frame of reference for dealing with handicap discrimination issues, the legal approaches developed in race, sex, national origin, and religious discrimination cases cannot be applied uniformly and mechanically. Handicap discrimination and, as a result, its remedies differ in important ways from other types of discrimination and their remedies. As a Federal court has observed:

> Contrary to the assumption of Congress, the Title VI and Title IX models were not automatically adaptable to the problem of discrimination against the handicapped, but involved a very different analytical undertaking. Indeed, attempting to fit the problem of discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole. . . .[43]

Legal Standards Defining Discrimination

Civil rights case law has developed two sets of legal standards for determining when race, national origin, or sex discrimination has occurred. The first, intentional discrimination, examines the state of mind of the actor. The second, "effects" discrimination, depends on the consequences of the challenged act.[44]

Intentional discrimination occurs when a decision includes a purposeful, nonremedial consideration of the class characteristic. This consideration might be made openly, as in State statutes that mandated segregating schools by race, or it might be hidden in the decisionmaking process, as in school officials' decisions to draw attendance zones in a way that segregates by race. In the latter situation, civil rights law draws on various

[39] *See* Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1381 (10th Cir. 1981); Kling v. County of Los Angeles, 633 F.2d 876, 879 (9th Cir. 1980); Miener v. State of Mo., 673 F.2d 969, 978 (8th Cir. 1982).

[40] Ferris v. University of Tex. at Austin, 558 F. Supp. 536, 539–43 (W.D. Tex. 1983); Brown v. Sibley, 650 F.2d 760, 767–69 (5th Cir. 1981); United States v. Baylor Univ. Medical Center, Civil Action No. CA-3-82-0453-D (N.D. Tex., Order of June. 7, 1983).

[41] Gelman v. Department of Educ., 544 F. Supp. 651, 653–54 (D. Col. 1982); Patton v. Dumpson, 498 F. Supp. 933, 937–39 (S.D.N.Y. 1980); Pomerantz v. County of Los Angeles, 674 F.2d 1288, 1290–91 (9th Cir. 1982); United Handicapped Fed'n v. Andre, 622 F.2d 342, 348 (8th Cir. 1980); Disabled in Action v. Mayor and City Council, 685 F.2d 881, 885–87 (4th Cir. 1982); Doe v. Marshall, 622 F.2d 118, 119–20 (5th Cir. 1980).

[42] New Mexico Ass'n for Retarded Citizens v. State of N.M., 678 F.2d 847, 853–55 (10th Cir. 1982). *See* Board of Educ. v. Rowley, 102 S.Ct. 3034 (1982).

[43] Garrity v. Gallen, 522 F. Supp. 171, 206 (D.N.H. (1981).

[44] *See Affirmative Action Statement,* pp. 16–17.

objective facts to infer the existence of discriminatory intent.[45]

Effects discrimination occurs when an action or criterion has a disproportionate effect based on race, national origin, or sex and cannot be justified by a legitimate reason, such as the safety and efficiency of an employer's operations.[46] This standard compares the effect of an employment decision on minorities or women to its effect on whites or men. Rather than examining the employer's subjective intent, the effects test focuses on whether the selection criteria reflect skills needed to perform the job in question. It would question, for example, whether a minimum height requirement of 5'8",which disproportionately excludes women and certain racial and ethnic groups, is necessary to the performance of a safety officer's job.[47] This standard is often referred to as "disparate impact" to distinguish it from the "disparate treatment" analysis applied to instances of intentional discrimination.[48]

Disagreement, inconsistency, and confusion have arisen over whether these legal standards apply to cases of handicap discrimination. One United States court of appeals has concluded that the jurisprudence and precedents pertaining to disparate treatment and disparate impact analysis under Title VII of the Civil Rights Act of 1964 directly apply to handicap discrimination.[49] Another Federal court of appeals, however, has ruled that neither of these prior civil rights standards applies to section 504 cases and the statute imposes its own unique criteria.[50] Legal commentary has also been inconsistent and unclear.[51] Additional confusion has resulted when

[45] *See, e.g.,* Washington v. Davis, 426 U.S. 229, 238–40 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[46] *See generally, Affirmative Action Statement;* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 425–34 (1975). Although this example of business necessity involves a statute prohibiting employment discrimination, other civil rights statutes also use effects standards, including those prohibiting discrimination in Federal financial assistance *(see* Charles Abernathy, "Title VI and the Constitution: A Regulatory Model for Defining Discrimination," *Geo. L.J.,* vol. 70 (1981), p. 1; *but see* The Guardians Ass'n v. Civil Service Comm'n, 633 F.2d 232 (2d Cir. 1980), *cert. granted,* no. 81–431 (Jan. 11, 1982), certain kinds of educational assistance (Board of Educ. of City of New York v. Harris, 444 U.S. 130 (1979)) and housing *(see* Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036–37 (2d Cir. 1979)).

[47] The courts have found such height requirements illegal when they are insufficiently job related. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Smith v. City of East Cleveland, 520 F.2d 492, 494–97 (6th Cir. 1975); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969).

[48] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36, n. 15 (1977).

[49] Prewitt v. United States Postal Service, 662 F.2d 292, 305–07, n. 19 (5th Cir. 1981).

[50] Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981) ("First, the individual is required to show that he is otherwise qualified for the position; second, the individual must show that even though he is otherwise qualified, he was rejected for the position solely on the basis of his handicap.")

[51] Some authorities have argued that judicial precedent defining other types of discrimination provides inadequate guidance for dealing with handicap discrimination. *E.g.,* Note, "Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act," *N.Y.U. L. Rev.,* vol. 55 (1980), pp. 881, 882 (hereafter cited as "Accommodating the Handicapped"). *See also* Gittler, pp. 953, 973–81. Other commentators have argued that prior civil rights decisions provide a good starting point and are highly instructive in resolving handicap discrimination cases. *E.g.,* Jonathan Lang, "Protecting the Handicapped from Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualification Doctrines," *DePaul L. Rev.,* vol. 27 (1978), pp. 989, 990, 1011 (hereafter cited as Lang).

courts have sought to apply traditional intent and effects tests without clearly understanding the distinctions among intent, blanket exclusions, and disproportionate impact.

The issue of intent has caused particular problems. One court has held that: "[i]n an intentional discrimination claim, the plaintiff must show that the defendant intentionally discriminated against the plaintiff because of the defendant's own personal bias against handicapped persons."[52] Another court rejected an intent test and adopted an effects test based on the following reasoning:

> It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons.[53]

In both cases, the courts apparently misunderstood the nature of the intent necessary for a finding of intentional discrimination. The standard turns on whether the defendant intended to treat people differently by using a classification prohibited by law, not why the defendant decided to take the action.[54] There is no requirement, for example, in school desegregation cases that plaintiffs must trace decisions to segregate schools by race to personal bias, hostility, or negative stereotyping. Proof of a defendant's malevolence, paternalism, or prejudice, therefore, should not be necessary to show intentional discrimination against handicapped people.

Judicial confusion and disagreement have also developed with regard to exclusionary classifications—disability categories or other selection criteria that exclude a particular class of handicapped people. In holding that a lower court had erred in failing to apply an intentional discrimination standard, one State supreme court ruled that a requirement of "normal vision" serves "as a direct disqualification of anyone with a visual handicap, in the same way that an advertisement of jobs for men only serves automatically to disqualify women. . . .Blanket exclusions, no matter how well motivated, fly in the face of the command to individuate that is central to fair employment practices."[55] The higher court held that the criterion is permissible only if it constitutes a bona fide occupational qualification, which under the State antidiscrimination statute was a "stringent and narrow" exception.[56] In another case, however, a Federal court of appeals applied a dispro-

[52] Bey v. Bolger, 540 F. Supp. 910, 925 (E.D. Pa. 1982).

[53] Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981).

[54] *See, e.g.,* Eric Schapper, "Two Categories of Discriminatory Intent," *Harv. Civ. Rts.-Civ. Lib. L.R.*, vol. 17 (1982), pp. 31, 47.

[55] Connecticut Inst. for the Blind v. Connecticut Comm'n on Human Rights and Opportunities, 176 Conn. 88, 405 A.2d 618, 621 (1978).

[56] *Id.* at 621. The BFOQ standard in the State law required a showing that "no member of the class excluded is physically capable of performing the tasks required by the job." *Id.* at 621. Some have concluded that a BFOQ defense cannot be applied to a handicap discrimination situation, e.g., Gittler. pp. 977–81, while others

portionality version of the effects test to a situation in which a man was found "medically unsuitable" for a post office job because he had a mobility limitation of the left shoulder.[57] This led the court to the ironic conclusion that the plaintiff had to prove "a disproportionate impact on persons having the handicap" of what was, in effect, an express exclusion of those with such a handicap.[58]

Neither of these cases offers a satisfactory approach for analyzing eligibility criteria that exclude groups of handicapped people. Because of the relation between handicaps and functional ability, not all criteria that exclude groups of handicapped people constitute intentional discrimination. But analysis of disproportionate effects is inappropriate when an eligibility standard on its face excludes certain handicapped people. Between these two alternatives the courts must forge a workable standard for examining handicap discrimination.[59] The courts must also grapple with the effect that concepts like reasonable accommodation and undue hardship have on evidentiary burdens and substantive analyses within traditional civil rights frameworks.[60]

Some generally accepted principles have begun to emerge. Among these are the applicability to handicap discrimination of some form of an effects test and a business- or program-necessity standard[61] and the need for stringent scrutiny of blanket exclusions using disability category labels.[62] These parallels to other civil rights law should not, however, obscure the complexities of trying to apply legal standards developed in

have argued that BFOQ analysis is appropriate. *E.g.*, Lang, pp. 1010–11. In some articles, the distinction between BFOQ analysis and the lesser standard of job relatedness seems to be blurred or ignored. *E.g.*, David Yuckman, "Employment Discrimination and the Visually Impaired," *Wash. & Lee L. Rev.*, vol. 39 (1982), pp. 69, 76–77, 83–84.

[57] Prewitt v. United States Postal Service, 662 F.2d 292, 305–307 (5th Cir. 1981).

[58] *Id.* at 310.

[59] In Jennings v. Alexander, 518 F. Supp. 877 (M.D. Tenn. 1981), the court ruled that an adverse impact standard did not require statistically identical results for handicapped and nonhandicapped persons as long as the program at issue was equally open and accessible to both groups. *Id.* at 883.

[60] *See, e.g.*, Prewitt v. United States Postal Service, 662 F.2d 292, 305–10 (5th Cir. 1981); Bey v. Bolger, 540 F. Supp. 910, 924–25 (E.D. Pa. 1982); "Accommodating the Handicapped," pp. 886–94.

[61] See chap. 6 in the section entitled "Exclusionary Classifications." A traditional form of disparate impact analysis involving disproportionality is explicitly used in the regulations of the Department of Health and Human Services for the enforcement of section 504 of the Rehabilitation Act. In regard to postsecondary education programs, the regulations provide that a recipient of Federal funds "[m]ay not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons" unless the test or criterion has been validated as measuring likelihood of success in the program and no other alternative tests or criteria are available. 45 C.F.R. §84.42(b)(2) (1982). Similarly, employers subject to section 504 are prohibited from using "any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons" unless the test or criterion is shown to be job related to the position in question and no alternative tests or criteria are available. 45 C.F.R. §84.13(a) (1982). In an "Appended Analysis of the Final Regulation," the Department states that this latter provision "is an application of the principle established under Title VII of the Civil Rights Act of 1964 in Griggs v. Duke Power Company, 401 U.S. 424 (1971)." 45 C.F.R. app. A, subpt. B, 17, p. 300 (1982).

[62] See chap. 6 in the section entitled "Exclusionary Classification."

other contexts to discrimination on the basis of handicap.

Neutrality Toward Class Characteristics

One major civil rights concept not neatly transferable to handicap discrimination is the requirement of neutrality toward the class characteristic, such as being "colorblind." With regard to race, sex, and national origin, antidiscrimination laws aim to eliminate consideration of race, sex, and national origin from decisions regarding rights, benefits, and services,[63] with the long-term goal of producing a society that makes differences in race, gender, and ancestry beneficial sources of diversity instead of objects of invidious discrimination. Because race, sex, and national origin have no direct connection with functional abilities,[64] this neutrality doctrine prohibits consideration of these characteristics except in the remedial context of affirmative action.

The handicap classification, in contrast, encompasses real functional limitations. The goal of handicap antidiscrimination law, therefore, cannot be complete neutrality or indifference to the defining characteristic. The societal objective of full participation entails considering and accommodating differing physical and mental functional abilities. In a decision requiring reasonable accommodation to the needs of handicapped employees, the Supreme Court of Washington observed:

> Legislation dealing with equality of sex or race was premised on the belief that there were no inherent differences between the general public and those persons in the suspect class. The guarantee of equal employment opportunities for the. . .handicapped is far more complex.
>
> Identical treatment may be a source of discrimination in the case of the handicapped, whereas different treatment may eliminate discrimination against the handicapped. . . .[65]

Unlike race, gender, and national origin, which should be considered only in remedial decisionmaking contexts, the characteristics that define handicap as a classification—the spectrum of human abilities and individual functional limitations—must routinely be taken into account to avoid discriminating on the basis of handicap.

There is, however, one major parallel to colorblindness in handicap law: exclusionary selection criteria that use the status category "handicapped" or traditional disability labels, such as blind, deaf, mentally retarded, epileptic, and so on.[66] Because these terms convey biased and stigmatizing information about func-

[63] *Affirmative Action Statement,* p. 2.

[64] The one exception to the statement is for bona fide occupational qualifications. In an employment context, the use of criteria of religion, sex, or national origin may be justified only by demonstrating that they are a bona fide occupational qualification (BFOQ) "reasonably necessary to the normal operation of that particular business or enterprise. . . ." 42 U.S.C. §2000e–2(e) (1976). No BFOQ defense is available for employment discrimination on the basis of race.

[65] Holland v. Boeing Co., 90 Wash. 2d 384, 583 P.2d 621, 623 (1978).

[66] See chap. 1 in the section entitled "Statistical

tional limitations, their use should be confined to remedial contexts. With regard to handicap discrimination, then, neutrality doctrines apply to eliminating traditional handicap labels from all but remedial decisionmaking, but not to making accurate assessments of individual functional abilities needed for appropriate accommodations permitting full participation.

Affirmative Action and Nondiscrimination

Based on its understanding of established civil rights law and policy, this Commission has urged a problem-remedy approach to affirmative action that defines this concept as "active efforts that take race, sex, and national origin into account for the purpose of remedying discrimination."[67] This definition justifies departing from the principle of neutrality toward race, gender, and national origin in remedial contexts only.[68] It is the systemic nature and pervasive extent of race, sex, and national origin discrimination that make affirmative action essential. Because race, sex, and national origin discrimination is widespread, entrenched, and can perpetuate itself even absent intentional discrimination, colorblindness and neutrality toward gender and national origin are insufficient for remedying many current discriminatory actions and the effects of past discrimination.

However, because established civil rights neutrality doctrines do not fully apply to handicap discrimination, neither can the totality of established concepts of affirmative action. The actual individual functional limitations that characterize handicaps must be taken into account as part of the duty not to discriminate on the basis of handicap, regardless of any affirmative action obligations. Awareness of and accommodations to real physical and mental differences, unlike "color consciousness," is desirable and necessary in other than remedial contexts.[69] As a result, definitions of affirmative action in handicap law must respond to this important way in which handicap discrimination differs from race, sex, and national origin discrimination.

Failing to appreciate these intricacies can lead to confusion about the meaning of affirmative action and its relationship to nondiscrimination requirements, particularly reasonable accommodation. Even the United States Supreme Court has insufficiently stressed the significant difference between analyzing handicap discrimination and analyzing other types of discrimination, and as a result, affirmative action. Commentators and other courts have criticized the Court's choice of terminology in *Southeastern Community College v. Davis*,[70] which is discussed in chapter 6.[71] In this unanimous opinion, the Supreme Court first distin-

Overview of Handicaps" and chap. 6 in the section entitled "Exclusionary Classifications."

[67] *Affirmative Action Statement*, p. 3.

[68] Justice Blackmun in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (Justice Blackmun concurring in part, dissenting in part) aptly summarized the superficially paradoxical aspects of affirmative action: "In order to get beyond racism, we must first take account of race."

[69] But as the discussion of neutrality also made clear, such awareness and accommodations do not require consideration of traditional handicap status categories, except for remedial purposes.

[70] 442 U.S. 397, 410–13 (1979).

[71] *See* Dopico v. Goldschmidt, 687 F.2d 644, 653 (2d Cir. 1982); Note, "Accommodating The Handicapped: Rehabilitating Section 504 After South-

guished "even handed treatment of qualified handicapped persons" from "affirmative efforts to overcome the disabilities caused by handicaps."[72] Having sharply distinguished between affirmative action and nondiscrimination, and implied that affirmative action can never be required unless the handicap civil rights statute commands affirmative action,[73] the Court then stated: "We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped people will always be clear."[74] Apparently, reasonable accommodation doctrines fit along this undefined line, because the Court discusses accommodation first as an affirmative action requirement[75] and two pages later discusses accommodation as a nondiscrimination requirement.[76]

These inconsistencies and contradictions appear to arise because the Court simply transposed established concepts of affirmative action and nondiscrimination to handicap law and failed to clarify the relationships among handicap discrimination, reasonable accommodation, and affirmative action. Appropriately responding to the actual functional limitations that attend handicaps is an essential part of eliminating handicap discrimination. As a result, neutrality doctrines do not carry over from race, sex, and national origin cases to handicap cases. Because the concept of affirmative action bases its exception to neutrality doctrines on the nature and extent of discrimination, affirmative action can only be defined after discrimination and neutrality issues are understood.

Handicap nondiscrimination laws mandate the elimination of all conduct, policies, and practices covered by such laws that unnecessarily disadvantage people because of their handicaps. The nature of handicap discrimination discussed in chapters 5 and 6 has made clear, a key component of nondiscrimination toward handicapped people is the requirement of reasonable accommodation. The nondiscrimination mandate and its reasonable accommodation component address acts, policies, and barriers that currently operate to exclude, segregate, or impede handicapped people.

Affirmative action, on the other hand, in the context of handicap discrimination, refers to some effort beyond nondis-

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eastern," *Colum. L. Rev.*, vol. 80 (1980), pp. 171, 185–86; Note, "Accommodating The Handicapped," *N.Y.U. L. Rev.*, vol. 55 (1980), p. 880. Construed literally, the Court's statement that "Congress understood that accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so," 441 U.S. at 411, would impose on the Federal Government and Federal contractors a substantively greater duty of accommodation than that imposed on recipients of Federal financial assistance. There is little apparent justification for such an approach.

[72] 442 U.S. 410 (1979).

[73] *Id.* at 410–12.

[74] *Id.* at 412.

[75] "A comparison of [sections 501, 503 and 504 of the Rehabilitation Act of 1973] demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.* at 411.

[76] "Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of these instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW." *Id.* at 412–13.

crimination and reasonable accommodation to increase the participation of handicapped people. It does not focus upon eliminating current discrimination, but rather on removing the present effects of past discrimination. The premise underlying such an affirmative action requirement is that the class of handicapped persons has been so seriously underrepresented in the past, either by the particular individual or agency involved or on a broader societal basis, that extra efforts are required to achieve an equitable level of participation. Typically this takes the form of outreach and recruiting efforts designed to increase the numbers of handicapped applicants and participants. In contrast to nondiscrimination requirements that seek to eliminate present disadvantages placed on people because of their handicaps, affirmative action seeks out people—or perhaps offers them some advantage—because they are a member of the class of handicapped persons. The nondiscrimination requirement of reasonable accommodation enables fair and equal consideration of a handicapped person's abilities. Affirmative action gives special incentives for getting handicapped people to participate, in order to ameliorate the ongoing effects of past exclusionary practices.

Reasonable accommodation is clearly a nondiscrimination requirement, as are the removal of other impediments that exclude groups of handicapped people such as architectural barriers, unjustified eligibility criteria, and exclusionary classifications. All of these address current discrimination by prohibiting unlawful disadvantaging of handicapped persons. Recruitment efforts targeted toward handicapped people, special consideration in hiring and promotion, and training for particular groups of handicapped individuals, however, because they are designed to promote increased participation by handicapped people as a partial remedy for their underinvolvement in the past, are examples of affirmative action.

Of course, affirmative action and nondiscrimination requirements share the overall goal of promoting full participation of handicapped persons, and the concepts do not always sharply diverge. The requirement of affirmative action has, in fact, been interpreted to incorporate nondiscrimination as an essential prerequisite.[77] Affirmative action to increase participation of handicapped persons would be meaningless if such efforts were then frustrated by continuing discrimination on the basis of handicaps. In spite of their interrelationship, however, the conceptual distinction between affirmative action, on the one hand, and nondiscrimination and reasonable accommodation, on the other, can help to avoid some of the confusion and analytic inconsistencies that have arisen.

Use of Statistics

Measurements of numerical representation have traditionally been an important feature of civil rights analysis. Statistics demonstrating a numerical underrepresentation of minority groups and women can play a major role in demonstrating a disparate impact form of discrimination and, in some circumstances,

[77] *E.g.*, Shirey v. Devine, 670 F.2d 1188 (D.C. Cir. 1982).

may serve as evidence of discriminatory intent.[78] Moreover, in pursuing the remedial goal of eliminating discrimination and its effects, affirmative action efforts have traditionally made extensive use of numerical objectives or goals. Such use is based on the assumption that disproportionate underrepresentation of minorities and women is an effect of past and continuing discrimination for which a remedy is needed.[79]

To date, statistics have been used infrequently with respect to handicap discrimination.[80] Few court decisions have viewed statistical evidence as proving disparate impact or suggesting intentional discrimination.[81] It would seem the absence of handicapped participants in a program or activity with many nonhandicapped participants might be evidence of discrimination. The total absence of people commonly considered handicapped from a large employer's work force, for example, is statistically so unlikely as to suggest discrimination. Given the connection between handicaps and functional limitations, however, disproportionate underrepresentation of people with a particular type of handicap does not necessarily indicate unlawful discrimination. A Federal court of appeals has considered the problem and ruled that statistical analysis like that employed in the racial context[82] should apply to cases of handicap discrimination with only "minor differences":

> One difference. . .is that, when assessing the disparate impact of a facially-neutral criterion, courts must be careful not to group all handicapped persons into one class, or even into broad subclasses. This is because "the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person."[83]

The link between handicaps and functional ability and the existence of disparate subclasses make statistical evidence more complicated to apply in handicap discrimination cases than in traditional civil rights contexts.[84]

[78] *Affirmative Action Statement,* pp. 16–18.

[79] Ibid., pp. 18–23, 33–34.

[80] *See, e.g.,* Gittler, pp. 971–73; Lang, pp. 1007–08.

[81] Some decisions have made use of numerical information in particular contexts. In Board of Educ. v. Rowley, 102 S.Ct. 3034 (1982), for example, the Supreme Court discussed various estimates of handicapped children receiving and not receiving special education services. *Id.* at 3045–46. In Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth., 549 F. Supp. 592, 613–14 (D.R.I. 1982), the court weighed the number of potential additional wheelchair users who would ride Rhode Island public transit buses if they were made accessible against the costs of making the buses accessible. In New Mexico Ass'n for Retarded Citizens v. State of N.M., 678 F.2d 847, 854 (10th Cir. 1982), the court indicated that the greater the number of children needing a special education service, the more likely that the failure to provide the service constitutes discrimination. In Gurmankin v. Costanzo, 626 F.2d 1132, 1135 (3d Cir. 1980), the court discussed the "numerosity" requirement under the Federal Rules of Civil Procedure of a proposed class of blind applicants who had been excluded from teaching jobs in the Philadelphia public schools. In none of these instances, however, were statistics used to indicate disproportionate representation in order to establish the existence of discrimination.

[82] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[83] Prewitt v. United States Postal Service, 662 F.2d 292, 307 (5th Cir. 1981), quoting Gittler, p. 972.

[84] In Jennings v. Alexander, 518 F. Supp. 877

Another problem with using statistical information to demonstrate handicap discrimination is the difficulty of obtaining useful statistics. Chapter 1 discussed the problem of securing accurate data on the prevalence of handicaps in the general population. In addition, it is sometimes difficult to obtain meaningful statistics about participation in programs or activities. And the number of handicapped applicants often provides too small a base for a traditional statistical study of the potential participant pool.[85]

Because of such complexities and difficulties, and in contrast to the numerical goals and timetables that have played a major role in affirmative action for women and minorities, affirmative action plans to combat handicap discrimination have seldom featured numerical information. As more accurate data become available, this situation is likely to change. The U.S. Equal Employment Opportunity Commission has required the setting of numerical goals and timetables with regard to the hiring of handicapped employees by Federal agencies.[86] Agencies with more than 500 employees must set specific goals to hire people with certain "severe" conditions, which have been denominated "targeted disabilities."[87]

These and other matters concerning the application of established civil rights principles to handicap discrimination have yet to be completely resolved. Questions remain about procedures for validating selection criteria that tend to screen out handicapped applicants[88] and about the effect that concepts like reasonable accommodation and undue hardship have on evidentiary burdens and substantive analyses.[89] Answering such questions will require a reasoned and consistent approach that derives from the nature and extent of handicap discrimination and the societal objective of full participation.

(M.D. Tenn. 1981), the court considered an alleged disparate impact upon handicapped persons of a reduction of medicaid coverage for inpatient hospital care from a maximum of 20 days per year to a proposed 14 days per year. Statistical evidence in the case indicated that handicapped medicaid recipients more often needed more than 14 days of inpatient care and thus would be disproportionately affected by the reduction. The court held that in the circumstances of the case, such statistical disparity did not amount to illegal discrimination. It ruled that as long as the program was "equally accessible" to handicapped and nonhandicapped persons, it need not be "equally productive" or produce statistically "identical results." *Id.* at 883.

[85] *E.g.*, Lang, p. 1007; Gittler, pp. 971–72.

[86] U.S., Equal Employment Opportunity Commission, *Management Directive 711*, Nov. 2, 1982, p. 3.

[87] The "targeted disabilities" are deafness, blindness, missing extremities, partial and complete paralysis, convulsive disorders, mental retardation, mental illness, and distortion of the limbs or spine. Ibid., p. 3.

[88] *See, e.g.*, Lang, pp. 1008–09.

[89] *See, e.g.*, Gittler, pp. 973–75; Lang, pp. 1007–08.

Conclusions

During the past 15 years, a substantial body of law has developed to address the problem of discrimination against handicapped persons. Increased public awareness of handicap discrimination has led to advances for handicapped people and changes in society. Nonetheless, many legal issues remain unresolved and relatively unexamined. *Accommodating the Spectrum of Individual Abilities* explores what we have learned about handicap discrimination and the laws prohibiting it, focusing on reasonable accommodation as a key legal requirement. The descriptive material in part I and the analytic framework and legal standards presented in part II provide overall guidance to those charged with interpreting and applying handicap nondiscrimination requirements.

Overall Conclusions

1. Historically, society has tended to isolate and segregate handicapped people. Despite some improvements, particularly in the last two decades, discrimination against handicapped persons continues to be a serious and pervasive social problem. It persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation.

2. Because of limited contact many nonhandicapped people know little about the abilities and disabilities of handicapped people. Although open hostility is now rare, prejudice against handicapped people, manifested as discomfort, patronization, pity, stereotyping, and stigmatization, remains common. Such prejudice involves an overreaction to differing physical and mental abilities that imputes more difference to handicapped persons than actually exists.

3. Extrapolations from existing data suggest that handicapped people are between 9 and 14 percent of the population. Problems with existing statistical information include divergent sources of data, conflicting definitions of terms, and inconsistent survey methodologies, which together render aggregated data imprecise. More reliable, standardized, and comprehensive data are needed.

4. Our Nation's declared goal for its handicapped population is full participation in society. Attaining this goal requires efforts by the public and private sectors to change conduct and attitudes and provide needed services. Substantial evidence suggests, and numerous authorities have concluded, that the benefits to society outweigh the costs of achieving full participation. Promoting increased social and economic participation by handicapped persons appears to be a sound long-term investment.

5. Along with constitutional guarantees of equal protection and due process, numerous State laws and almost 30 Federal laws prohibit discrimination against handicapped people. A major impetus of the Federal statutes is a broad prohibition of discrimination on the basis of handicap by Federal Government agencies, Federal contractors, and recipients of Federal financial assistance. Particularly stringent requirements and specific rights have been established with respect to elementary and secondary education for handicapped children. These include a guarantee of free appropriate public education for each handicapped child and procedures that assure parental involvement and fair decisionmaking about educational placements. A major component of many Federal laws and regulations is a requirement of individualized programming to assess the particular abilities and meet the particular needs of each handicapped individual.

6. In general, handicap antidiscrimination provisions prohibit conduct, policies, and practices that result in any of several types of discrimination against handicapped people: intentional exclusion; unintentional exclusion; segregation; unequal or inferior services, benefits, or activities; less effective services, benefits, or activities; and use of screening criteria that have a disparate impact and do not correlate with actual ability.

7. The removal of architectural, transportation, and communication barriers is required to varying degrees by a number of handicap antidiscrimination laws. All new Federal and federally assisted buildings must be accessible. Further, all Federal and federally assisted programs and activities must be accessible, which sometimes requires the alteration of existing buildings. With some exceptions, cost is not a defense to providing such accessibility. The legal standards under three separate Federal statutes mandating accessible mass transit have varied and continue to be uncertain. In some circumstances, communication barriers to handicapped people may constitute illegal discrimination that must be eliminated.

Differing Abilities and Social Context

Many issues in handicap antidiscrimination law remain disputed or relatively unexamined. Several orienting principles derived from the underlying causes and nature of handicap discrimination can assist the development of coherent and consistent legal standards.

1. The source of much discrimination against handicapped people is a common view of handicaps as physical or mental disorders that inevitably limit ability, performance, and success. Under this view, any disadvantage or inequality handicapped persons suffer is thought to occur primarily because they are "dis-

abled" and cannot take advantage of opportunities. A contrary view focuses on societal actions and prejudice as the causes of restricted opportunities for people with mental and physical limitations. Proponents of this view hold that there are no handicapped people—that it is society that "handicaps" people. This monograph adopts a third view, which is based on the nature of physical and mental differences, social conditions, and their interplay.

2. Human abilities occur as spectrums; for each separate mental or physical function, there is a range of ability to perform, with some individuals performing superlatively, some minimally or not at all, and some at every level in between. Variations also occur in the devices and techniques for minimizing functional limitations and in the life experiences, motivation, and individual preferences for dealing with functional limitations.

3. In addition, the significance of particular abilities varies from context to context. Virtually everyone is "handicapped" for one purpose or another. More than is commonly supposed, society is inherently adaptable to differences in mental and physical abilities. Programs and activities can produce their intended benefits in a variety of reasonable and practical ways. There are many ways to structure tasks and activities to change the relative value of particular abilities. Alternatives exist for, among other things, grouping, locating, and scheduling tasks and activities and choosing devices and techniques for achieving them.

4. To a great extent, society determines the consequences of physical and mental differences by the way it defines and carries out its tasks and activities. Society's operations—from its sidewalks to its schoolrooms and its jobs—ordinarily are designed for people whose abilities fall in the "normal" range. As a result, they exclude or seriously disadvantage people whose abilities do not mesh with the particular methods by which society customarily accomplishes tasks and objectives.

5. Our society creates handicap discrimination when it distorts the abilities of handicapped people by drawing lines across the spectrum of physical and mental abilities and labels those on one side "handicapped" and those on the other "normal." The handicapped-normal dichotomy and the traditional disability categories, such as blind, deaf, mentally ill, mentally retarded, orthopedically handicapped, and learning disabled, are oversimplifications of the spectrum of individual abilities. They involve both arbitrary placement of lines and the lumping together of dissimilar conditions under a single label.

6. Interactions between mental and physical differences and social and economic contexts are highly diverse and individualized. Not all physical or mental differences cause functional impairments; not all functional impairments restrict activities; and not all activity restrictions cause vocational or avocational limitations. Therefore, actions based on the assumption that people with a particular type of handicap are incapable of participating in a given opportunity frequently are discriminatory.

Reasonable Accommodation

1. The courts have interpreted handicapped nondiscrimination laws to require "meaningful equal opportunity," a phrase that takes into account both the functional limitations the term "handicap" implies and the fact that alternative methods of performing tasks or activities often permit people of varying abilities to participate without jeopardizing outcomes. Simply treating handicapped people "like everyone else" is frequently unlawful. To accomplish meaningful equal opportunity for handicapped persons, regulators and the courts have required "reasonable accommodation"—that is, the provision or modification of devices, services, facilities, practices, or procedures in order to match particular persons with particular programs or activities.

2. The legal standards as to what contexts, for whom, in what ways, and to what extent reasonable accommodations must be made are not fully resolved. Moreover, the diversity of human abilities and of institutions, programs, and activities makes it impossible to state a simple legal formula that produces definitive answers for all situations. Reasonable accommodation is more usefully viewed as a process of considering all factors relevant to the particular context. In applying this process, several key legal principles are emerging that provide guidance.

Individualization

Reasonable accommodation emphasizes individualization, a process of considering the physical and mental abilities of a handicapped individual and whether there are equally effective alternative methods of achieving essential objectives that would permit his or her participation. Elementary and secondary education, higher education, and employment are three major areas in which handicap discrimination laws require that opportunities be tailored to individual needs.

"Qualified" Individual

Title V of the Rehabilitation Act limits nondiscrimination protection and the right to reasonable accommodation to handicapped persons who are "otherwise qualified." That phrase defines the class of handicapped people who can perform the essential functions, who meet essential eligibility criteria, or who are otherwise capable of benefiting from the program or activity. A handicapped individual may not be found unqualified without considering whether a reasonable accommodation would render the individual qualified.

Stated Qualifications and Selection Criteria

The law also uses the word "qualified" in the sense of meeting stated qualifications. The removal of discriminatory qualifications is a legal prerequisite to rendering individualized accommodation. Courts have scrutinized and frequently struck down exclusionary classifications based on traditional disability categories. Similarly, selection criteria that inaccurately or unnecessarily measure physical or mental abilities may also illegally exclude handicapped people. Federal regulations require employment selection criteria that disadvantage handicapped individuals to be job related and, under some standards, necessary or essential. To withstand scrutiny, non-employment-related selection criteria

must also generally be "essential." Exceptions to prohibitions of disability-based blanket classifications and non-task-related criteria include remedial programs for handicapped people and certain safety-related criteria.

Equivalence

As a guide to the appropriateness of an accommodation, the law has developed the concept of equivalence. This flexible standard ranges from requiring full and identical participation to requiring only roughly comparable benefit. The concept of equivalent, as opposed to identical, opportunities means that, wherever possible, the individual needs of handicapped people should be met to the same extent that the corresponding needs of nonhandicapped persons are met. To accomplish this goal, adjustments to regular programs or the provision of different programs may sometimes be necessary.

Limits on the Duty to Accommodate

Limits on the duty to accommodate flow from the central concept that essential program components are to be preserved. As with the principle of individualization, the distinction between essential, as opposed to incidental, program elements applies, and legal standards differ depending on the societal area involved. Generally, substantial modifications that impinge on essential program components or purposes or that impose undue financial and administrative burdens are not legally required. In areas like employment, excessive costs may limit the duty to render reasonable accommodation. In other circumstances, as with a handicapped child's right to a free appropriate public education, cost is only a consideration in choosing among alternative ways of satisfying the obligation; it is not a defense to the duty itself.

Applying Established Civil Rights Law to Handicap Discrimination

1. The legal theories, principles, and precedents of traditional civil rights law should be applied to handicap discrimination cases only when, and to the degree that, they are equally relevant.

2. The classification "handicapped" has unique features: it is usually predicated upon actual functional differences that may impede performance; it is indefinite, having a multiplicity of definitions and an extremely heterogeneous membership; it is nonexclusive—everyone may become a member; and its members are subject to a medical model and are often perceived as "sick." Moreover, handicaps, which have many causes, may be ameliorated by medical, mechanical, and technological advances. These characteristics distinguish handicap discrimination from other forms of discrimination, and the distinctions may have legal consequences.

3. The two legal standards for proving discrimination in traditional civil rights law—one concerned with the intent behind actions and the other with their effects—should not be mechanically applied to handicap discrimination cases, but must be adapted to the nature of handicap discrimination.

4. Concepts of neutrality toward the class characteristic, such as "color-blindness" toward race, are only partially applicable to handicap discrimination issues. Because of the relationship between handicap classifications and real

functional limitations, such neutrality or indifference is not the goal of handicap discrimination prohibitions. Individual functional limitations must be taken into account to avoid discriminating on the basis of handicap. A major parallel to the concept of colorblindness, however, is a requirement to avoid classifications based on traditional handicap status categories.

5. Handicap nondiscrimination provisions and their reasonable accommodation component prohibit conduct, policies, and practices that currently exclude, segregate, or impede handicapped people. In the context of handicap discrimination, affirmative action refers to some effort beyond nondiscrimination and reasonable accommodation to remove the present effects of past discrimination by promoting increased participation of handicapped people. The premise underlying handicap affirmative action requirements is that handicap discrimination has engendered such a serious underrepresentation of handicapped persons, either in the particular agency, program, or activity involved, or on a broader societal basis, that efforts beyond nondiscrimination requirements are required to achieve an equitable level of participation.

6. Because of the limitations of available statistical information, it has not played as great a role in handicap discrimination law as it has in other areas. The use of data may increase, however, especially in targeting persons with particular severe disabilities for affirmative action efforts.

7. The key to applying established civil rights law is whether it would further the goal of providing practical and efficient ways of eliminating discrimination against handicapped people and promoting their full participation.

APPENDIX A

This appendix identifies some major social and legal mechanisms, practices, and settings in which handicap discrimination arises. The items listed are issue areas in which problems of discrimination occur, however, no implication is intended that the listed practices necessarily are discriminatory. For example, the inclusion of "legal restrictions on contractual capacity" in the outline does not indicate that all such legal restrictions are discriminatory, but rather that some particular restrictions and their implementation have caused discrimination against handicapped persons. This list is exemplary only and should not be considered exhaustive.

Discrimination Against Handicapped Persons
Outline of Issue Areas

I. EDUCATION

Major Types or Areas of Discrimination

1. Exclusion
2. Inappropriate programs and placements
3. Nonidentification
4. Misclassification of racial and ethnic minorities
5. Absence of procedural protections
6. Noneducation of institution residents
7. Segregation (nonmainstreaming) of handicapped pupils
8. Dealing with handicaps as disciplinary problems
9. Lack of parental and student knowledge of educational rights

II. EMPLOYMENT

Major Types or Areas of Discrimination

1. Preemployment inquiries
2. Hiring criteria
3. Lack of outreach (affirmative action)
4. Promotions
5. Employment benefits and insurance
6. Termination
7. Working conditions
8. Employer and fellow employee attitudes
9. Institutional peonage (nontherapeutic work programs)
10. Below-standard wages
11. Sheltered workshops
12. Vocational rehabilitation programs
13. Worker's compensation

III. ACCESSIBILITY OF BUILDINGS AND THOROUGHFARES

Major Types or Areas of Discrimination

1. Types of barriers
   a. Entrances
   b. Stairs
   c. Curbs
   d. Elevators
   e. Toilet facilities
   f. Signals and warning devices
   g. Telephones
   h. Water fountains

i. Carpeting
j. Doorways and doors
k. Steep, long, or dangerous ramps
l. Absence of handrails
m. Parking areas

2. Where barriers occur
a. Governmental buildings
b. Schools
c. Stores, shops, shopping centers, and other commercial establishments
d. Hotels, recreational facilities, parks
e. Public housing
f. Private homes
g. Sidewalks and streets
h. Public monuments

IV. TRANSPORTATION

Major Types or Areas of Discrimination (Both Physical Barriers and Rules, Policies, and Practices)

1. Public transit systems
a. Inaccessible buses
b. Inaccessible trains, trolleys, and subway vehicles
c. Inaccessible ferries
d. Inaccessible terminals
2. Bus companies
3. Trains
4. Airlines
5. Taxis and limousine service
6. Rental cars
7. Ships and boats
8. Private vehicles
a. Adaptations
b. Licensing requirements

V. COMPETENCY AND GUARDIANSHIP

Major Types or Areas of Discrimination

1. Overly intrusive guardianship procedures (all-or-nothing approach)
2. Absence of adequate procedural protections
3. Improper persons or agencies as guardians; conflicts of interest
4. Problems with institutional and public guardianship

VI. INSTITUTIONS AND RESIDENTIAL CONFINEMENT

Major Types or Areas of Discrimination

1. Large-scale institutions
2. Commitment procedures
a. Standards for involuntary commitment
b. Procedural prerequisites
3. Conditions in institutions
4. Lack of treatment and habilitation programs
5. Abuse and neglect of residents
6. Denormalization
7. Absence of community alternatives
8. Continuation of construction and expansion of large institutions

VII. HOUSING

Major Types or Areas of Discrimination

1. Denial of access to public housing
2. Zoning obstacles
3. Restrictive covenants
4. Lack of accessible housing
5. Overly protective fire codes and other regulations
6. Lack of group homes, cluster homes, cooperative living arrangements, and other residential alternatives for handicapped people

VIII. MEDICAL SERVICES

Major Types or Areas of Discrimination

1. Denial of lifesaving medical treatment to handicapped infants
2. Problems with informed consent for medical treatment for handicapped persons
3. Electroconvulsive therapy
4. Psychosurgery
5. Psychotropic drugs
6. Access to medical records

7. Consent to medical treatment of institutionalized persons
8. Organ donations from handicapped children
9. Discriminatory policies of hospitals and doctors
10. Medical experimentation

IX. SEXUAL, MARITAL, AND PARENTAL RIGHTS

Major Types or Areas of Discrimination

1. Involuntary sterilization
2. Sexual segregation of institution residents
3. Restriction of sexual practices of persons in residential programs
4. Denial of access to contraception
5. Restriction of access to information about sexuality, reproduction, and contraception
6. Legal restrictions on marriages by handicapped people
7. Refusal to permit cohabitation of married couples in residential institutions
8. Removal of children and termination of parental rights of handicapped parents
9. Awarding custody of children to non-handicapped party in divorce proceedings
10. Denial of adoption rights to handicapped individuals

X. CONTRACTS, OWNERSHIP, AND TRANSFER OF PROPERTY

Major Types or Areas of Discrimination

1. Legal restrictions on contractual capacity
2. Legal restrictions on testamentary capacity
3. Practical difficulties of some physically handicapped persons in making a will or entering into a contract
4. Representative payees
5. Denial of personal possessions to institution residents

XI. VOTING AND HOLDING PUBLIC OFFICE

Major Types or Areas of Discrimination

1. State laws restricting voting rights of mentally handicapped persons
2. Denial of opportunity for institution residents to vote
3. Architectural barriers at polling places
4. Absence of assistance in ballot marking
5. Inequity of absentee ballots
6. Restrictions on rights of handicapped persons to hold public office

XII. LICENSES

Major Types or Areas of Discrimination

1. Restrictions on driver's licenses
   a. Vision
   b. Hearing
   c. Epilepsy
   d. Orthopedic handicaps
   e. Other conditions
2. Restrictions on hunting and fishing licenses
3. Other types of licenses

XIII. INSURANCE

Major types or areas of discrimination

1. Restrictions on availability to handicapped persons of:
   a. Life insurance
   b. Health and accident insurance
   c. Automobile insurance
   d. Disability insurance
   e. Worker's compensation
   f. Other
2. Availability of, and need for, actuarial data

XIV. IMMIGRATION

Major Types or Areas of Discrimination

1. Exclusion of handicapped aliens (even children of qualified immigrants)

2. Congressional standards for admission to U.S.

XV. PERSONAL PRIVACY

Major Types or Areas of Discrimination

1. Nude or other embarassing photos of institution residents
2. Publication of information, including identity of handicapped persons, without permission

XVI. RECREATIONAL AND ATHLETIC PROGRAMS

Major Types or Areas of Discrimination

1. Denial of access to varsity sports teams
2. Denial of access to intramural sports programs
3. Denial of access to professional and semipro teams (e.g., *Neeld v. National Hockey League)*
4. Inaccessible recreation facilities and programs
5. Absence of athletic and recreational opportunities for handicapped persons comparable to those available to nonhandicapped individuals

XVII. CRIMINAL JUSTICE SYSTEM

Major Types or Areas of Discrimination

1. Disproportionate number of mentally retarded people in prisons and juvenile facilities
2. Improper handling and communication with handicapped persons by law enforcement personnel
3. Insufficient availability of interpreters
4. Application of insanity defense
5. Application of incompetency to stand trial
6. Inadequate treatment and rehabilitation programs in penal and juvenile facilities
7. Inadequate ability to deal with physically handicapped accused persons and convicts (e.g., accessible jail cells and toilet facilities)
8. Abuse of handicapped persons by other inmates

XVIII. CONSUMER PROTECTION

Major Types or Areas of Discrimination

1. Defective wheelchairs, prosthetic devices, canes, glasses, hearing aids, etc.
2. Fraudulent schemes targeted at handicapped persons

XIX. SERVING ON JURIES

Major Types or Areas of Discrimination

1. Disqualification of many handicapped persons from jury service
2. Absence of accommodations to permit handicapped persons to serve as jurors

XX. ACCESS TO MASS MEDIA

Major Types or Areas of Discrimination

1. Insufficient captioning of television programs
2. Insufficient availability of braille and tape-recorded versions of publications
3. Insufficient availability of radio information in visual form (news, sports, weather, upcoming events, public information, etc.)

XXI. PARTICIPATION IN MILITARY

Major Types or Areas of Discrimination

Explicit ineligibility of handicapped persons for induction into military service

Appendix B
Handicap Civil Rights Statutes

Methodology

The following list of U.S. Code provisions was compiled mainly through use of the JURIS system, a computerized legal research system maintained by the Department of Justice, as well as with reference to the General Accounting Office's 1978 publication, *A Compilation of Federal Laws and Executive Orders for Nondiscrimination and Equal Opportunity Programs.*

This list includes measures that prohibit discrimination on the basis of handicap, ensure equal opportunity without regard to handicap, or require affirmative action for handicapped individuals in programs not specifically targeted for the handicapped. It includes not only general requirements, but also specific ones that condition the receipt of certain funds or participation in certain programs. As a result, some of the statutes provide broad and sometimes overlapping protections (e.g., 29 U.S.C. §794, prohibiting discrimination on the basis of handicap in any program or activity receiving Federal financial assistance, covers the social services and elementary and secondary education block grants created by the Omnibus Budget Reconciliation Act of 1981 as well as block grant programs created by that law with specific handicap antidiscrimination prohibitions). The list excludes many handicap laws with civil rights provisions or objectives, such as 29 U.S.C. §791(c) (1976), as amended by Reorg. Plan No. 1 of 1978, §4, 42 U.S.C. 2000e–4 note (Supp. V 1981), requiring the U.S. Equal Employment Opportunity Commission and the Office of Personnel Management to develop for referral to State agencies policies and procedures to facilitate employment of handicapped persons. The list also excludes provisions requiring the setting of standards to avoid handicap discrimination, such as 42 U.S.C. §4152 (1976 & Supp. V 1981), requiring the setting of Federal standards with regard to architectural barriers. Also excluded are service programs aimed specifically at handicapped persons, although some of these programs, including those that provide education and training, may be essential for attaining civil rights objectives.

Some provisions listed are permanent (e.g., 29 U.S.C. §794, prohibiting discrimination on the basis of handicap in any program or activity receiving Federal financial assistance). Others, such as those nondiscrimination sections listed

below under the Omnibus Budget Reconciliation Act of 1981, remain in force only as long as the specific programs continue to exist.

All statutes listed refer to the classification of handicap. The list does not include statutes dealing with specific kinds of handicaps, such as 42 U.S.C. §4581 (1976), prohibiting discrimination against alcohol abusers and alcoholics in admission or treatment by hospitals receiving Federal funds; 20 U.S.C. §1684 (1976), prohibiting discrimination against blind people in federally funded education programs or activities; 30 U.S.C. §938 (1976 & Supp. V 1981), prohibiting discrimination by mine operators against sufferers of pneumoconiosis (black lung disease); and 38 U.S.C. §801 (1976 & Supp. V 1981), providing assistance to disabled veterans in acquiring or adapting housing needed because of the disability. Finally, all statutes are listed without reference to the availability of administrative or private enforcement mechanisms.

Civil Service Reform Act of 1978

5 U.S.C. §2302(b)(1)(D) (Supp. V 1981) (prohibits personnel actions that discriminate on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973).

5 U.S.C. §7116(b)(4) (Supp. V 1981) (makes it an unfair labor practice for labor organizations representing Federal employees to discriminate on the basis of handicapping condition with regard to membership in the labor organization).

5 U.S.C. §7203 (Supp. V 1981) (empowers the President to prescribe rules prohibiting discrimination because of handicapping condition in certain types of Federal employment).

Full Employment and Balanced Growth Act

15 U.S.C. §3151(a) (Supp. IV 1980) (prohibits discrimination on the basis of handicap in any program or activity funded under the Full Employment and Balanced Growth Act).

Education of the Handicapped Act

20 U.S.C. §1412 (1976) (requires State, in order to qualify for assistance under this act, to have a policy and a plan for assuring all handicapped children the right to a free appropriate public education).

20 U.S.C. §1413 (1976) (requires State plans to set policies and procedures to assure that assistance provided under this act will be utilized in a manner consistent with the goal of providing a free appropriate public education for all handicapped children).

Foreign Service Act of 1980

22 U.S.C. §3905(b)(1) (Supp. V 1981) (prohibits discrimination based on handicapping condition in the Foreign Service).

22 U.S.C. §4115(b)(4) (Supp. V 1981) (makes it an unfair labor practice for a labor organization to discriminate on the basis of handicapping condition against an employee of the Department of State).

Federal-Aid Highway Act of 1973

23 U.S.C. §142 note (1976) (Bus and Other Project Standards) (requires projects using Federal highway funds to be planned, designed, constructed, and operated to permit use by handicapped persons).

23 U.S.C. §402(b)(1)(E) (Supp. V 1981) (prohibits approval of State highway safety programs that do not provide access for handicapped persons to move safely and conveniently across curbs).

Rehabilitation Act of 1973

29 U.S.C. §791(b) (1976) (requires each Federal agency to develop affirmative action program plans for the hiring, placement, and advancement of handicapped persons).

29 U.S.C. §793 (1976 & Supp. V 1981) (requires Federal contracts and subcontracts over $2,500 to contain provisions requiring contractors to take affirmative action to employ and advance handicapped persons).

29 U.S.C. §794 (Supp. V 1981) (prohibits discrimination on the basis of handicap in any program or activity receiving Federal financial assistance).

Job Training Partnership Act

29 U.S.C.A. §1577(a)(1) (West Supp. 1982) (provides that programs and activities financially assisted under the Job Training Partnership Act are considered to receive Federal financial assistance for purposes of applying 29 U.S.C. §794 prohibitions against discrimination on the basis of handicap).

29 U.S.C.A. §1577(a)(2) (West Supp. 1982) (prohibits exclusion from participation, denial of benefits, and employment and other discrimination on the basis of handicap in programs receiving funds under this act).

General Accounting Office Personnel Act of 1980

31 U.S.C.A. §732(b)(2) (1983) (prohibits personnel practices prohibited in 5 U.S.C. §2302(b), including discrimination based on handicap).

State and Local Fiscal Assistance Amendments of 1976

31 U.S.C.A. §6716(b)(2) (1983) (prohibits discrimination based on handicap in any program or activity funded under the State and Local Fiscal Assistance Amendments of 1976).

Omnibus Budget Reconciliation Act of 1981

42 U.S.C. §300w-7(a)(1) (Supp. V 1981) (prohibits discrimination based on handicap in programs and activities funded under preventive health and health services block grants).

42 U.S.C. §300x-7(a)(1) (Supp. V 1981) (prohibits discrimination based on handicap in programs and activities funded under alcohol and drug abuse and mental health services block grants).

42 U.S.C. §300y-9(a)(1) (Supp. V 1981) (prohibits discrimination based on handicap in programs and activities funded under primary care block grants).

42 U.S.C. §708 (Supp. V 1981) (prohibits discrimination based on handicap in programs and activities funded under maternal and child health services block grants).

42 U.S.C. §5309(a) (Supp. V 1981) (prohibits discrimination based on handicap in programs and activities funded under community development programs).

42 U.S.C. §9849(c) (Supp. V 1981) (prohibits the Secretary from providing funds under the Head Start program unless the grant or contract specifically provides that no persons with pro-

gram responsibilities will discriminate against any individual on the basis of handicapping condition).

42 U.S.C. §9906(a) (Supp. V 1981) (prohibits discrimination based on handicap in any program or activity funded under the community services block grant program).

Domestic Volunteer Service Act Amendments of 1978

42 U.S.C. §5057(a) (Supp. V 1981) (prohibits financial assistance under the ACTION program unless the grant, contract, or agreement specifically provides that no person with program responsibilities will discriminate on the basis of handicap).

42 U.S.C. §5057(c)(1) (Supp. V 1981) (requires the application of nondiscrimination provisions in title V of the Rehabilitation Act of 1973, [29 U.S.C. §§791-794] to applicants and volunteers under the Domestic Volunteer Service Act and the Peace Corps Act [22 U.S.C. §2501-2519 (1976 & Supp. v 1981), as amended by 22 U.S.C.A. §§2501-2517 (West Supp. 1982)]).

Developmental Disabilities Assistance and Bill of Rights Act

42 U.S.C. §6005 (1976) (requires recipients of assistance under this legislation to take affirmative action to employ and advance handicapped persons).

42 U.S.C. §6063(b)(5)(C) (Supp. V 1981) (requires State plans to assure protections consistent with the rights enumerated in §6010, including the provision of treatment, services, and habilitation in the least restrictive settings).

Urban Mass Transportation Act of 1970

49 U.S.C. §1612(a) (1976), as amended by 49 U.S.C.A. §1612(c) (West Supp. 1982) (in conjunction with 29 U.S.C. §794 of the Rehabilitation Act, requires States receiving Federal funds for mass transit to make special efforts in the planning and design of mass transit facilities and services to accommodate handicapped persons).

Appendix C
Charts

Table 1

The discussion in chapter 1 detailed the following estimated ranges of the proportion of handicapped people in each age group.

Age	High estimate	Low estimate
0–21	9.4%	5.7 %
16–64*	12.0	8.57
65+	35.0	20.0

* Institutionalized people are included in the 0–21 and 65+ groups, but not for the 16–64 group because the number could not be determined from available data.

Table 2

The following represent the 1980 census figures for the population broken into the appropriate age groups:

0–19 years of age	72,468,363 (A)
20–64 years of age	128,531,000 (B)
65+ years of age	25,541,000 (C)

(U.S., Department of Commerce, Bureau of the Census, *1980 U.S. Census, Provisional Estimate of Social, Economic, and Housing Characteristics* (1982), p. 3.) Using both high and low estimates of the handicapped population from table 1 provides the following results:

9.4% of (A) = 6,811,992	5.7 % of (A) = 4,130,676
12.0% of (B) = 15,423,720	8.57% of (B) = 11,182,110
35.0% of (C) = 8,939,350	20.00% of (C) = 5,108,200
TOTAL 31,175,062	**TOTAL 20,420,986**

This total represents 13.7 percent of the total population.

This total represents 9 percent of the total population.

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